Supreme Court, U.S.
FILED
JUN 8 1994
OFFICE OF THE CLERK

93-1985

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

STATE OF ARIZONA,

PETITIONERS

-vs-

WADE BRUCE COOK,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Pursuant to *United States v. Dixon*, 113 S. Ct. 2849 (1993), may a court dismiss a criminal indictment based upon its analysis under *United States v. Halper*, 490 U.S. 435 (1989), of a previously imposed administrative assessment when the criminal proceedings involve the same general conduct as the previous administrative proceedings, but the criminal indictment does not charge the same offenses upon which the administrative assessment was based?

2. Pursuant to *Dixon*, does a court determining if a previous administrative assessment is punishment under *Halper* examine the entire assessment, or only that portion of it attributable to the same offenses upon which the subsequent criminal indictment is based?

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The opinion of the Arizona Court of Appeals is reported at 870 P.2d 413, and is reprinted in Appendix A, *infra*.

The Arizona Supreme Court's denial of the State's petition for review is unreported, and is reprinted in Appendix B, *infra*.

STATEMENT OF JURISDICTION

The State of Arizona seeks review of the Arizona Court of Appeals' decision in *State v. Cook*, 870 P.2d 413 (Ariz. App. 1993), filed on June 10, 1993. (Appendix A.) The State filed a timely petition for review by the Arizona Supreme Court, which the Arizona Supreme Court denied by order on April 6, 1994. (Appendix B.) This present petition for writ of certiorari was filed on June 6, 1994, within 60 days of the Arizona Supreme Court's order denying the State's petition for review.

This Court has jurisdiction to review the opinion of the Arizona Court of Appeals pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution provides:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATUTORY PROVISIONS INVOLVED

The pertinent parts of the statutes involved in this case, A.R.S. §§ 13-2301(D)(4)(s) and (t), -2310, -2312, 44-1841, -1842, -1991, and -2036 are set forth in full in Appendix C, *infra*.

STATEMENT OF THE CASE

On May 18, 1989, the Arizona Corporation Commission ["the Commission"] found that Cook and several corporations owned by him ["the corporations"] had violated A.R.S. §§ 44-1841 (sale of unregistered securities), -1842 (transactions by unregistered dealers and salesmen), and -1991 (fraud in purchase or sale of securities). (Arizona Corporation Commission Opinion and Order, filed May 18, 1989, Appendix D, *infra*, at D-15 to D-16.) Among others, Ray McNally and Ludwig Steininger testified at the administrative hearing. (*Id.* at D-3.) Following the hearing, the Commission made specific findings that Cook committed the alleged violations in transactions involving Mr. and Mrs. Ray McNally, Ludwig Steininger, and Gary Huish. (*Id.* at D-7 to D-14.) It also found that Cook had received at least $390,841.50 from at least 150 investors. (*Id.* at D-14.) The Commission ordered Cook and the corporations to cease and desist violating the State's securities laws, to pay $390,841.50 in restitution, and to pay an administrative penalty of $1,000 per victim—$150,000—pursuant to A.R.S. § 44-2036. (*Id.* at D-16 to D-17.)

On September 12, 1990, the grand jury indicted Cook on one count of fraudulent schemes and artifices (A.R.S. § 13-2310), eight counts of sale of unregistered security (A.R.S. § 44-1841), eight counts of sale of security by an unregistered salesman (A.R.S. § 44-1842), and one count of illegal enterprises (A.R.S. §§ 13-2301(D)(4)(s) and (t), -2312). (Indictment, filed Sept. 12, 1990, Appendix E, *infra*.) Four of these counts—counts 6, 8, 14, and 16—named either the McNallys and Mr. Steininger as victims. (*Id.* at E-5 to E-6, E-9 to E-10.) The remaining counts involved victims who had neither been named in the Commission's order nor testified at the administrative proceeding. (*Id.* at E-2 to E-12.)

Cook moved to dismiss the indictment with prejudice, claiming that the previous administrative assessment made the subsequent indictment violative of the Double Jeopardy Clause. (Superior Court Order, dated May 9, 1991, Appendix F, *infra*, at F-1.) The trial court held a hearing and considered evidence regarding the government's expenditures to investigate Cook and bring the administrative action against him. (*Id.* at F-2.) Based upon the wording of the Commission's order and testimony from the attorney

who handled the administrative proceeding for the State, the trial court held that both the Commission and the State's attorney subjectively intended the $150,000 administrative penalty to be punitive and to serve as deterrence. (*Id.* at F-3 to F-4.) The trial court also ruled that the government suffered expenses totalling $31,492.05 in investigating this case and presenting it to the Commission. (*Id.*) Based upon this evidence, the trial court held that the administrative assessment of $150,000 was punishment that prohibited the subsequent criminal indictment. (*Id.* at F-4 to F-6.) In so doing, the trial court relied upon *United States v. Halper*, 490 U.S. 435 (1989), which it characterized as prohibiting civil sanction following a conviction "in a criminal action arising from the same circumstance," and *State v. Mullet*, 816 P.2d 251 (Ariz. App. 1991), *cert. denied*, 112 S. Ct. 1245 (1992), which it characterized as examining whether an administrative penalty prohibited criminal prosecution "based on the same conduct." (*Id.* at F-4 to F-5.)

The State appealed. The Arizona Court of Appeals affirmed the trial court's dismissal. It held that, under *Halper*, *Mullet*, and *Taylor v. Sherrill*, 819 P.2d 921 (Ariz. 1991), the Double Jeopardy

Clause prohibits multiple punishment for the same offense, and applies were the first "punishment" is an administrative assessment. (Appendix A, at A-3 to A-6.) It stated that an administrative assessment is punitive, rather than remedial, when it is not rationally related to making the government whole. (*Id.*) The court of appeals then analyzed whether the trial court abused its discretion in finding the administrative assessment imposed in the present case was punitive, thus prohibiting subsequent attempts to punish. (*Id.* at A-9 to A-15.) The court did not specifically examine whether the basis of the administrative assessment and the criminal indictment were the "same offenses," having previously stated that they involved the same conduct.

In determining whether the trial court had abused its discretion, the Arizona Court of Appeals first examined the language of A.R.S. § 44–2036, the statute authorizing the administrative assessment, to determine whether it was intended for remedial or punitive purposes. (Appendix A, at A-6 to A-7.) Finding little guidance there, and rejecting the State's arguments regarding the remedial purposes generally served by securities laws, the court of appeals next

examined the wording of the Commission's order imposing the assessment, and testimony of the state attorney who handled the administrative case before the Commission. (*Id.* at A-6 to A-7, A-9 to A-10.) It found that the Commission's and the attorney's subjective intent in imposing the assessment were "objective evidence" that the assessment was intended for punitive and deterrent purposes, rather than remedial ones. (*Id.* at A-9 to A-10.) In so doing, the court of appeals rejected the State's arguments that subjective intent was immaterial. (*Id.* at A-10.)

The Arizona Court of Appeals then compared the amount of the entire assessment to the costs and attorney's fees suffered by the State in pursuing the administrative action before the Commission. It rejected the State's arguments that the trial court erred in not considering the intangible damages suffered by the State, such as the injury to the State's economy and the lowering of its tax base. (Appendix A, at A-11 to A-12.) The court of appeals also rejected the State's argument that *Halper's* holding was a limited one, applicable only to prolific, small-gauge offenders, but not to prolific large-gauge offenders like Cook, who had been ordered to pay more

than $390,000 in restitution to 150 victims. (*Id.* at A-12 to A-13.) The court of appeals then held that the trial court had not abused its discretion in finding that the assessment in the present case was not rationally related to making the State whole, rejecting the State's argument that the assessment was not overwhelmingly disproportionate to its losses. (*Id.* at A-13 to A-15.)

Less then 3 weeks after the court of appeal's decision, this Court issued *United States v. Dixon*, 113 S. Ct. 2849 (1993), overruling *Grady v. Corbin*, 495 U.S. 508 (1990). Based upon *Dixon*, the State filed a petition for review with the Arizona Supreme Court. (Petition for Review, filed July 19, 1993, Appendix G, *infra*.) The State argued that, pursuant to *Dixon*, the Arizona Court of Appeals had erred in dismissing those counts in the criminal indictment that passed the *Blockburger*[1] same elements test. (*Id.* at G-10 to G-16.) It also argued that, in light of *Dixon*, the court of appeals misapplied *Halper* by comparing the State's costs to the entire administrative assessment, rather than only to that portion of the assessment attributable to the same offenses for which Cook was

1. *Blockburger v. United States*, 284 U.S. 299 (1932).

subsequently indicted. (*Id.* at G-16 to G-23.) The Arizona Supreme Court denied the State's petition for review. (Appendix B.)

ARGUMENTS

I

THE LOWER COURTS NEED GUIDANCE REGARDING HOW *DIXON* AND *HALPER* INTERACT WHEN THE ADMINISTRATIVE ASSESSMENT PRECEDES THE CRIMINAL INDICTMENT AND BOTH PROCEEDINGS ARE GENERALLY BASED UPON THE SAME CONDUCT.

This Court has yet to explain how the *Halper* analysis applies when the criminal indictment follows, rather than precedes, the administrative assessment, and the effect *Dixon* has on such an analysis. This Court should accept this petition for writ of certiorari to clarify this matter, and provide guidance to the many courts dealing with these issues. The need for such guidance is demonstrated by the erroneous analysis in this case.

The Double Jeopardy Clause prohibits the State from twice placing a defendant in jeopardy "for the same offense," by prohibiting both successive prosecutions for the same offense following acquittal or conviction, and multiple punishments for the

same offense. U.S. Const. amdt. V; *North Carolina v. Pearce*, 395 U.S. 711 (1969). The Double Jeopardy Clause is applicable to the states via the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 793–94 (1969).

In ruling that the Double Jeopardy Clause applied in the present case, both the trial court and the Arizona Court of Appeals apparently relied upon the holding in *Grady v. Corbin*, 495 U.S. 508 (1990), that the Double Jeopardy Clause applied not only to actions for offenses containing the same elements (the *Blockburger* test), but also to actions involving the same conduct. *Grady v. Corbin*, 495 U.S. at 510. As indicated above, the trial court relied upon *Halper* and *Mullet*, which it said applied to subsequent actions "arising from the same circumstances," and "based on the same conduct." Similarly, the court of appeals stated that the subsequent indictment was "for the same conduct which was the subject of the proceedings before the corporation commission."

Shortly after the court of appeals decision in this case, however, this Court overruled *Grady v. Corbin*. *Dixon*, 113 S. Ct. at 2860. The relevant test is no longer whether the two actions

involve the same conduct, the standard relied upon by the courts in this case. Pursuant to *Dixon*, the sole test for determining whether the Double Jeopardy Clause applies to prohibit successive or multiple punishments is the same elements test previously set forth by the Court in *Blockburger*. *Dixon*, 113 S. Ct. at 2856. This test "inquires whether each offense contains an element not contained in the other." *Id.* Where each offense contains an element not contained in the other, they are not the "same offense," and the Double Jeopardy Clause provides no bar to multiple punishments or successive prosecutions. *Id.* The Double Jeopardy Clause does not apply to prosecutions or punishments based upon similar types of transactions involving different victims. *See Ashe v. Swenson*, 397 U.S. 436, 446 (1970) (pre-*Grady*).

Applying only *Blockburger*, the Double Jeopardy Clause does not apply to fourteen of the eighteen counts in the criminal indictment in this case. As indicated above, the Commission found Cook in violation of A.R.S. §§ 44-1841, -1842, and -1991 based upon transactions involving the McNallys and Mr. Steininger, and Cook was later criminally indicted under §§ 44-1841 and -1842 for

the same transactions with these victims. These counts, involving the same statutes, victims, and transactions, fail the *Blockburger* test and the Double Jeopardy Clause may be applied to them.

Although counts 2 through 5, 7, 9 through 13, 15, and 17 of the criminal indictment involve the same general securities fraud conduct that formed the basis of the administrative assessment, these counts involve six victims who did not testify before the Commission and about whom the Commission made no findings in its order. While the Commission ordered Cook to pay an $150,000 assessment based upon his receipt of money from 150 victims, there is no evidence in the record on appeal that the additional six people listed on the indictment were among those 150 victims. Thus, there is no evidence that $6,000 of the assessment ($1,000 per victim) is based upon violations against these victims. Without such evidence, the Double Jeopardy Clause does not apply to those counts, regardless of whether the assessment constituted "punishment" under *Halper*. Based upon *Dixon*, both the trial court and the court of appeals erred in concluding that the Double Jeopardy Clause applied to those counts in the indictment involving victims who were not the basis of

the assessment. This error is premised on the courts' findings that the administrative proceeding and the subsequent indictment involved the "same conduct." This issue did not arise, and is not addressed, in *Halper* because both the criminal charges and civil assessment involved the same 65 false Medicare claims. 490 U.S. at 437–438.

In addition to the counts of the indictment involving victims not named in the administrative proceedings, two counts of the indictment, counts 1 and 18, charge Cook with violating statutes other than the ones the Commission found he had violated. These charges, while arguably violating *Grady* because based upon the same conduct leading to the administrative assessment, do not violate *Dixon* because they pass the *Blockburger* same elements test. Thus, they do not violate the Double Jeopardy Clause.

The Arizona Coutrial courtrt of Appeals has subsequently held that *Dixon* eviscerates the need for a *Halper* analysis where the subsequent criminal indictment is not based upon the same offenses as the previous administrative assessment, even if it is based upon the same conduct. *Hernandez v. Superior Court*, 1994 WL 192446, at 5–6, ___ P.2d ___, ___ (Ariz. App., May 19, 1994.) In

Hernandez, the court recognized that its decision in *Cook* is based upon the now improper *Grady* same conduct test. *Hernandez*, 1994 WL 192446, at 3.

Although *Hernandez* is correctly decided, the lower courts still need this Court's guidance on how to apply *Dixon* to criminal indictments following administrative or civil assessments. This Court should therefore accept certiorari and address this issue. If nothing else, this Court should accept certiorari and remand this case to the Arizona Court of Appeals for reconsideration in light of *Dixon*, and the Arizona Court of Appeals' own pronouncement in *Hernandez* that this case is incorrectly decided in light of *Dixon*.

II

THE LOWER COURTS NEED GUIDANCE ON HOW TO APPLY *HALPER* IN LIGHT OF *DIXON* WHERE A DEFENDANT IS CRIMINALLY INDICTED FOR ONLY A PORTION OF THE OFFENSES UPON WHICH HE HAS PREVIOUSLY FACED AN ADMINISTRATIVE ASSESSMENT.

This case presents another important issue which this Court not yet addressed—how the *Dixon* and *Halper* analyses apply when the criminal indictment follows, rather than precedes, the administrative

assessment, and involves only a portion of the offenses for which the defendant received an administrative assessment. As indicated above, the Double Jeopardy Clause *is* applicable to those counts in the criminal indictment involving the McNallys and Mr. Steininger because both the indictment and the Commission's findings against Cook are based upon the same violations of A.R.S. §§ 44-1841 and -1842. In light of *Dixon's* same offense rather than same conduct requirement, however, the Arizona Court of Appeals misunderstood and misapplied *Halper* to those counts to which the Double Jeopardy Clause applies.

In *Halper*, the defendant was convicted of 65 counts of violating the criminal false claims statute, and 16 counts of mail fraud, based upon his filing of 65 false claims for Medicare reimbursement. 490 U.S. at 437. The government then brought a civil action for all 65 false claims, alleging 65 violations of the civil False Claims Act. *Id.* at 438.[2] Pursuant to the civil statute, the defendant was liable for a civil penalty of $2,000 per violation, plus

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2. In the present case, the administrative proceedings came before the criminal proceeding. This Arizona Supreme Court has held that this distinction does not change the applicability of *Halper*. *Taylor v. Sherrill*, 819 P.2d at 929.

double damages, for a total civil liability of over $130,000. *Id.* This Court held:

> [U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Id. at 448–49.

In determining whether the civil assessment was remedial or so grossly disproportionate that it constituted punishment, the Court examined whether there was a rational relationship between the amount of the civil assessment and the damages to the government caused by defendant's conduct. *Halper*, 490 U.S. at 449. The Court limited its holding as follows:

> [T]he only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole.

Id. at 451 (footnote omitted). Applying its ruling, the Court remanded the matter to the district court to allow the government to present evidence of the injuries caused by the defendant's actions.

Id. at 452. Because this decision was pre-*Dixon*, it did not discuss the relationship between "same conduct" and "same offenses."

The Arizona Court of Appeals stated that it was applying *Halper* in determining whether the $150,000 assessment constituted punishment. In *Halper*, however, the criminal proceedings and subsequent civil penalty were based upon the *same* 65 false claims. In contrast, in this case the administrative assessment of $150,000 was based upon 150 victims—$1,000 per victim—while the criminal proceeding involved only two victims, the McNallys and Mr. Steininger, to whom the Double Jeopardy Clause applied.[3] The court of appeals did not appreciate this distinction, and examined the issue of whether the entire $150,000 assessment was punishment. Only $2,000 of that assessment, however, was attributable to violations involving the McNallys and Mr. Steininger—the violations for which Cook was subsequently criminally indicted.

Once again, the court of appeals, without having the benefit of *Dixon*, misunderstood the "same offense" limitation of the Double

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3. As discussed in the previous section, the Double Jeopardy Clause does not apply to the other six victims named in the indictment because there is no evidence that the Commission based a portion of its assessment upon the same offenses for which Cook was subsequently indicted.

Jeopardy Clause. It is immaterial that Cook was sanctioned $148,000 for his securities violations involving 148 other victims. The Double Jeopardy Clause only protects against multiple punishments for the same offense, not for the same conduct involving other victims. Therefore, the correct inquiry is whether that portion of the civil assessment attributable to the offenses for which the defendant is subsequently being criminally prosecuted constitutes punishment pursuant to *Halper*. Thus, the court of appeals should have examined whether the $2,000 assessment attributable to the McNallys and Mr. Steininger constituted punishment pursuant to *Halper*.

Given the proper analysis, the court of appeals did not need to engage in a detailed analysis of the government's costs and losses. Such an analysis only becomes necessary where the cumulative affect of a fixed penalty may become overwhelmingly disproportionate due to the offender's prolific nature:

> What we announce now is a rule for the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.
>
> . . . .

> It hardly seems necessary to state that a suit under the Act alleging *one or two false claims would satisfy the rational-relationship requirement*. It is only when a sizable number of false claims is present that, as a practical matter, the issue of double jeopardy may arise.

Halper, 490 U.S. at 449, 451 n.12 (emphasis added). Thus, the $2,000 assessment based upon two victims satisfies the rational relationship requirement. Therefore, the subsequent criminal proceeding is not barred by double jeopardy.

Even if the other six victims are considered, a total of only eight $1,000 assessments are present. This is still not the type of prolific situation to which the Court's rule would apply. An $8,000 recovery is no more than the rough justice to which the State was entitled for these particular incidents. Thus, none of the criminal indictment is barred by double jeopardy and it was improperly dismissed.

The same result is reached under a full-blown *Halper* analysis. The trial court found the State suffered $1,492.05 in costs and $30,000 in attorneys' fees. Both Mr. McNally and Mr. Steininger testified at the administrative hearing, and, as indicated above, the Commission made specific findings regarding violations in

transactions with them. Thus, a disproportionate amount of the attorneys' fees and costs are related to the violations against these victims. Therefore, dividing the $31,492.05 by the 150 victims does not give an accurate picture of the State's expenditures for the violations for which it subsequently indicted Cook. Given the increased significance at the administrative hearing of claims involving the McNallys and Mr. Steininger, plus the incidental costs related to the other six victims, an $8,000 assessment does not appear so grossly disproportionate to the State's expenditures as to bar the subsequent criminal proceeding.

Therefore, this Court should reverse the dismissal of the indictment, or, in the alternative, remand the case to the Arizona Court of Appeals with instruction to determine whether that portion of the administrative assessment attributable to the victims named in the criminal indictment is rationally related to the remedial goal of making the State whole for the State's expenditures attributable to those victims in the administrative proceedings. In so doing, this Court should also instruct the lower court to consider the State's intangible losses caused by Cook's conduct.

CONCLUSION

Pursuant to *Dixon*, the Double Jeopardy Clause applies only to successive prosecutions and multiple punishments for the same offense. Given *Dixon*, the court of appeals opinion in this case is based upon incorrect premises. The court of appeals applied the Double Jeopardy Clause to bar a criminal indictment for offenses that were not the basis of a previous administrative assessment. Additionally, in determining whether an administrative assessment was punishment, it looked at the entire assessment even though only a portion of it was attributable to offenses for which Cook was subsequently indicted. These fundamental misconceptions regarding application of the Double Jeopardy Clause will be perpetuated in this and other cases absent guidance from this Court. The State therefore respectfully requests this Court to accept its petition for writ of certiorari and reverse the court of appeals opinion, setting forth the correct analysis as discussed above.

As indicted in *Hernandez*, even the Arizona Court of Appeals itself now recognizes that its decision in this case is incorrect in light of *Dixon*. Therefore, if this Court declines to address the issues

presented in this petition, the State asks this Court to accept its petition for writ of certiorari, and remand the matter to the Arizona Court of Appeals for reconsideration in light of this Court's decision in *Dixon*. For all of the above-stated reasons, the State of Arizona respectfully requests that the Court grant its certiorari petition.

Respectfully submitted,

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APPENDIX A

[Filed June 10, 1993]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA	)	1 CA-CR 91-0760
	)	
Appellant,	)	DEPARTMENT A
	)	
v.	)	O P I N I O N
	)	
WADE BRUCE COOK,	)	
	)	
Appellee.	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR-90-10121

The Honorable Norman D. Hall, Jr., Judge

AFFIRMED

Grant Woods, The Attorney General
By Paul J. McMurdie, Chief Counsel, Criminal Division
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Attorneys for Appellant — Phoenix

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K L E I N S C H M I D T, Judge

The state appeals from an order dismissing an indictment charging the defendant, Wade Bruce Cook, with violations of the Arizona securities laws. We conclude that the trial court was correct in finding that the imposition of a $150,000 penalty in a prior administrative proceeding constituted punishment within the meaning of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, thus barring the state from prosecuting Cook criminally.

In February of 1989, the Securities Division of the Arizona Corporation Commission accused Cook of selling unregistered securities, selling securities without a license, and securities fraud, violations of Ariz. Rev. Stat. Ann. ("A.R.S.") sections 44-1841, 44-1842 and 44-1991, respectively. Following a hearing, the commission found that Cook had committed these violations and ordered him to cease and desist from the sale of securities in Arizona, make restitution in the amount of $390,841 to a number of investors, and pay a $150,000 administrative penalty.

Subsequently, Cook was indicted for the same conduct which was the subject of the proceedings before the corporation commission. He moved to dismiss the indictment on the ground that the $150,000 penalty previously imposed was punishment which, under the Double Jeopardy Clause, precluded the state from seeking further criminal sanctions. Following an evidentiary hearing, the trial court, relying on *United States v. Halper*, 490 U.S. 435 (1989), and *Mullet v. Miller*, 168 Ariz. 594, 816 P.2d 251 (App. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1245 (1992), concluded that criminal prosecution violated the Double Jeopardy Clause. The court found that the administrative penalty was "punitive," not "remedial," as those terms are used in *Halper* and it dismissed the indictment with prejudice. The state challenges that dismissal.

A CIVIL SANCTION CAN BE "PUNISHMENT" FOR DOUBLE JEOPARDY PURPOSES

In *United States v. Halper*, the Supreme Court reaffirmed that multiple punishments for the same offense imposed in different proceedings violate the Double Jeopardy Clause. 490 U.S. at 435. Halper had been prosecuted criminally for submitting sixty-five

fraudulent Medicare billings that totalled $585. He was convicted, imprisoned and fined $5,000. Subsequently, the government brought an action against him under the federal civil False Claims Act. The district court granted summary judgment for the government on the issue of liability but refused to impose the statutory penalty of $130,000. The court ruled that imposing such a penalty would violate the Double Jeopardy Clause by punishing Halper a second time for the same conduct. The Supreme Court agreed, stating:

> We . . . hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

490 U.S. at 448–49. The term "remedial," as the court used it in *Halper*, refers to a sanction that is intended to recompense the government for the loss the defendant caused. the court explained:

> The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relations to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting for the Government's damages and costs to determine

> if the penalty sought in fact constitutes a second punishment.

Id. at 449–50.

Halper has been construed by the appellate courts of this state in several decisions which the parties have cited as bearing on the issue before us. In *Mullet v. Miller*, Division Two of this court remanded a criminal prosecution to the trial court to determine whether an administrative penalty of $380,000 imposed by the corporation commission for a violation of the securities laws, "was rationally related to making the state whole " 168 Ariz. at 597, 826 P.2d at 254. The court of appeals directed the trial court to dismiss the prosecution if it found that the penalty was not related to making the state whole. *Id.* at 597–98, 826 P.2d at 254–55.

In *Taylor v. Sherrill*, 169 Ariz. 335, 819 P.2d 921 (1991), the supreme court considered a claim that a default judgment for civil traffic violations precluded a criminal prosecution for assault and criminal damage that arose out of the same incident. The court concluded that the defendant had the burden of demonstrating that a previous civil sanction constituted "punishment." *Id.* at 344, 819

P.2d at 930. It found that the defendant had failed to carry his burden on this issue because the maximum civil penalty that could be imposed for each offense was $250, and the record did not disclose what penalties had actually been imposed or whether the defendant had paid them. The court also resolved an issue implicit in the case now before us; for purposes of double jeopardy analysis, it makes no difference that the criminal action follows, rather than precedes, the civil proceeding. *Id.* at 343, 819 P.2d at 929.

The statute authorizing administrative penalties gives little guidance as to whether such penalties are intended to be punitive ore remedial. At the time of the proceeding in question it read:

> A. A person who, in an administrative action, is found to have violated any provision of this chapter or any rule or order of the commission may be assessed an administrative penalty by the commission, after a hearing, in an amount not to exceed five thousand dollars for each violation.
>
> B. In the event of noncompliance with commission orders, the attorney general may bring actions to recover penalties pursuant to this section in the name of this state in the superior court of Maricopa County. Nothing in this section shall be construed to limit the right of a party in an action under this section to a trial by jury.

> C. Any penalties collected pursuant to this section shall be remitted to the state treasurer for deposit in the state general fund.

A.R.S. § 44-2036.

We find no merit in the state's attempt to classify the administrative penalty as non-punitive by invoking the general "remedial" purpose behind the securities laws. *See United States v. Naftalin*, 606 F.2d 809 (8th Cir. 1979). The state's argument that the commission's "purpose" is "to safeguard the investing public from fraudulent devices" is irrelevant to the double jeopardy question before us because that purpose may be fulfilled by a "punitive" sanction as well as by a "remedial" one.

THE STANDARD OF REVIEW

We first consider the appropriate standard of review. Many constitutional questions, even mixed questions of law and fact, are reviewed de novo. An exhaustive analysis of the subject in general is found in *United States v. McConney*, 728 F.2d 1195 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). We agree, however, with Cook's contention that the issue presented by this case is properly

reviewed for an abuse of discretion. In *Halper*, the Supreme Court noted:

> We must leave to the trial court the discretion to determine on the basis of [an accounting of the Government's damages] the size of the civil sanction the Government may receive without crossing the line between remedy and punishment.

490 U.S. at 450; *accord Mullet*, 168 Ariz. at 597, 816 P.2d at 254.

A deferential standard of review is suggested by the fact-sensitive inquiry the trial court is called upon to make in resolving this type of double jeopardy claim. In *Halper*, the Supreme Court rejected the government's contention that determining the nature of the civil sanction imposed was truly a matter of statutory construction. 490 U.S. at 447. The Court said:

> [W]hile recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general mater, the approach is not well suited to the context of the "humane interests" safeguarded by the Double Jeopardy Clause's proscription of multiple punishments . . . . This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.

Id. (citations and footnote omitted).

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION

The court found that the state incurred costs of $1,492 and attorney's fees of $30,000 in the administrative proceeding. The $150,000 penalty far exceeds these sums, easily supporting the conclusion that the purpose of the sanction was not solely remedial. *See Halper*, 490 U.S. at 452 (disparity between government costs of $16,000 and penalty of $130,000 is "sufficiently disproportionate that the sanction constitutes a second punishment in violation of double jeopardy").

The trial court scrutinized the commission's order for sanctions, nothing the language which explained: "taking into consideration the fact that Mr. Cook appropriated investors' funds for personal purposes, the Commission agrees with the [securities] Division that Respondents should be assessed an administrative penalty of $150,000." This statement, which focused on Cook's conduct rather than on the loss to the state, is objective evidence of a punitive intent. *See Kvitka v. Board of Registration in Medicine*, 551 N.E.2d 915, 918 (Mass.), *cert. denied*, ___ U.S. ___, 111

S.Ct. 74 (1990) (administrative fine imposed after physician's guilty plea was punishment, court noting that licensing board characterized defendant's actions as "'a flagrant abuse of public trust'" and stated that "'misconduct in the area of prescription practice will not be treated lightly'").

The trial court also relied on the testimony of Jim D. Nielsen, an attorney for the securities division, given at the hearing on the motion to dismiss. Nielsen, who prosecuted the action before the corporation commission, stated that the fine proposed by the division and adopted by the commission had no remedial purpose, but was intended to deter Cook and others from committing similar acts.

The state argues that Nielsen's intent was immaterial and that the commission's purpose must be discerned from its own order. We do not believe the evidence need be viewed that narrowly. Certainly, what Nielsen testified to had a bearing on whether the state was even attempting to recoup damages and costs through the imposition of the penalty.

The state also argues that the trial court erred by narrowly viewing the state's loss as the cost of maintaining the administrative proceeding against Cook. Rather, the state asserts that the combined effect of Cook's conduct injured the state's economy and lowered the state's tax base. such intangible costs, it argues, are difficult to quantify but may nonetheless be recovered as a remedy. *See, e.g., United States v. Walker*, 940 F.2d 442, 444 (9th Cir. 1991) (customs penalty not punishment because it was justified by the financial burden associated with maintaining checkpoints and administering the customs system); *United States v. Valley Steel Products, Co.*, 729 F. Supp. 1356, 1360 (Ct. Int'l Trade 1990) (liquidated civil penalties for illegal importation of steel not barred by prior criminal sanction; court notes that in absorbing costs of investigation and prosecution, the government suffers diffuse harm from repercussions due to defendant's conduct).

In this case, however, the state never even claimed such an intangible loss in proceedings before the commission or, more significantly, before the trail judge at the hearing on the motion to dismissal. We agree with Cook that the state's effort to justify the

penalty as commensurate with its actual loss falls short of what *Halper* requires. In *United States v. Hall*, 730 F. Supp. 646 (M.D. Pa. 1990), the district court reached a similar conclusion in addressing the government's attempt to obtain a $1 million civil penalty from a previously-convicted defendant who failed to file a report regarding an international transfer of securities. The court stated:

> [T]he Government puts forth only the most minimal effort at establishing a rational relationship between the $1,035,000 civil penalty and the goal of making the Government whole. Beyond its general assertions concerning the "heavy burden" of investigation and prosecution and the injury to the United States' trade and economic programs, which it characterized as "impossible to measure, with precise certainty," the Government makes no attempt to quantify the actual losses it suffered as a result of [defendant's] criminal misconduct. The absence of such a quantification, when coupled with the disproportionate relationship between the amount of the tine and the damages apparently caused by [defendant's] conduct, leads the court to conclude that this fine is not rationally related to the goal of making the Government whole.

Id. at 655.

The state also asserts that the trial court erred in applying *Halper* because that case announced "a rule for the rare case, the case such as the one before us where a fixed-penalty provision

subjects a prolific but small gauge offender to a sanction overwhelmingly disproportionate to the damage he has caused." 490 U.S. at 449.

The state contends that Cook, in light of the fact he was ordered to pay restitution or more than $390,000 to 150 victims of the securities law violations, was not a "small gauge offender," entitled to protection under *Halper*. This fact, however, adds nothing to the calculation of the state's own loss, which is the relevant consideration for this double jeopardy analysis. *Halper* makes this point clear, stating: "The protections of the Double Jeopardy Clause are not triggered by litigation between private parties." *Id.* at 451. Cook has never argued that the restitution order was punishment which would trigger the Double Jeopardy Clause.

The state also argues that the $150,000 penalty imposed is not "overwhelmingly disproportionate" to the state's proven costs of more than $31,000. We find no support for this contention in *Halper*. Although in that case the Supreme Court did indicate that a penalty which exceeded the government's actual costs would not

necessarily offend the Double Jeopardy Clause, it did not suggest any particular ratio of costs to penalty that should serve as a threshold for double jeopardy analysis. Rather, to be classified as remedial, the penalty imposed must be "rationally related" to the goal of making the Government whole. *Id.* at 451. That relationship may be established when the state's loss is close to the civil sanction imposed, even if the sanction exceeds it. *Id.* at 449. ("process of affixing a sanction that compensates the Government for all its costs invariably involves an element of rough justice"); *see also State v. Darby*, 587 A.2d 1309 (N.J. Super. Ct. App. Div. 1991) (civil sanction of $292,000 in securities case was rationally related to government's $205,000 in costs, plus office expenses, physical plant costs, travel time, and trial costs). In this case, we agree with the trial court that no such rational relationship was established.

Finally, we agree with Division Two of this court in rejecting the argument that the punishments can be accumulated so long as they remain within statutory limits. *See Mullet*, 168 Ariz. at 598, 816 P.2d at 255 ("While multiple punishments may be imposed in a single proceeding for the same conduct if authorized by statute, the

double Jeopardy Clause clearly prohibits a second proceeding to punish for the same conduct"). In this context, the state's reliance on *Jones v. Thomas*, 491 U.S. 376 (1989), which considered punishment for multiple offenses in a *single* proceeding, is misplaced.

The order of the superior court dismissing the indictment with prejudice is affirmed.

s/ Thomas C. Kleinschmidt
THOMAS C. KLEINSCHMIDT, Judge

CONCURRING:

s/Susan A. Ehrlich
SUSAN A. EHRLICH
Presiding Judge, Department A

s/Joe W. Contreras
JOE W. CONTRERAS, Judge

[2788]

APPENDIX B

Supreme Court
State of Arizona
402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329
Telephone: (602) 542-0306

Noel K. Dessaint
Clerk of the Court

Kathleen E. Kempley
Chief Deputy Clerk

April 6, 1994

RE: STATE OF ARIZONA vs. WADE BRUCE COOK
Supreme Court No. CR-93-0366-PR
Court of Appeals No. 1 CA-CR 91-0760
Maricopa County No. CR 90-10121

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 5, 1994, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix this 6th day of April, 1994.

NOEL K. DESSAINT, Clerk

TO:

Hon. Grant Woods, Attorney General ATTN: Paul J. McMurdie, Esq., Warren J. Granville, Esq. and Linda L. Knowles, Esq.

Edward F. Novak, Esq. and Charles W. Steese, Esq., Lewis and Roca

Lee Polson, Esq., King, Polson and Associates

Glen D. Clark, Clerk, Court of Appeals, Division One, Phoenix

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APPENDIX C

A.R.S. § 13-2301. Definitions

. . . .

(D) For purposes of §§ 13-2312 through 13-2315, unless the context otherwise requires:

. . . .

4. "Racketeering" means any act, including any preparatory or completed offense, committed for financial gain, which is chargeable or indictable under the laws of the state in which the act occurred . . . regardless of whether such act is charged or indicted, involving:

. . . .

(s) Sale of unregistered securities or real property securities and transactions involving such securities by unregistered dealers or salesmen.

(t) A scheme or artifice to defraud.

A.R.S. § 13-2310. Fraudulent schemes and artifices; classification; definition

A. Any person who, pursuant to a scheme or artifice to defraud, knowing obtains any benefit by means of false or fraudulent

pretenses, representations, promises or material omissions is guilty of a class 2 felony.

. . . .

A.R.S. § 13-2312. Illegal control of an enterprise; . . . classification

A. A person commits illegal control of an enterprise if such person, through racketeering or its proceeds, acquires or maintains, by investment or otherwise, control of any enterprise.

. . . .

C. A knowing violation of this section is a class 3 felony.

A.R.S. § 44-1841. Sale of unregistered securities prohibited; classification

A. It is unlawful to sell or offer for sale within or from this state any securities unless such securities have been registered by description under §§ 44-1871 through 44-1875 or registered by qualification under §§ 44-1891 through 44-1902, except securities exempt under § 44-1843 or 44-1843.01 or securities sold in exempt transactions under § 44-1844.

B. A person violating this section is guilty of a class 4 felony.

A.R.S. § 44-1842. Transactions by unregistered dealers and salesmen prohibited; classification

A. It is unlawful for any dealer to sell or purchase or offer to sell or buy any securities, or for any salesman to sell or offer for sale any securities within or from this state unless the dealer or salesman is registered as such pursuant to the provisions of article 9 of this chapter.

B. A person violating this section is guilty of a class 4 felony.

A.R.S. § 44-1991. Fraud in purchase or sale of securities

It is a fraudulent practice and unlawful for a person, in connection with a transaction or transactions within or from this state involving an offer to sell or buy securities, or a sale or purchase of securities, including securities exempted under § 44-1843 or 44-1843.01 and including transactions exempted under § 44-1841, directly or indirectly to do any of the following:

1. Employ any device, scheme or artifice to defraud.

2. Make any untrue statement of material fact, or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

3. Engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit.

A.R.S. § 44-2036. Administrative penalty

A. A person who, in an administrative action, is found to have violated any provision of this chapter or any rule or order of the commission may be assessed an administrative penalty by the commission, after a hearing, in an amount of not to exceed five thousand dollars for each violation.

B. Any penalties collected pursuant to this section shall be remitted to the state treasurer for deposit in the state general fund.

APPENDIX D

[Docketed May 18, 1989]

BEFORE THE ARIZONA CORPORATION COMMISSION

RENZ D. JENNINGS
CHAIRMAN
MARCIA WEEKS
COMMISSION
DALE H. MORGAN
COMMISSIONER

IN THE MATTER OF THE OFFERING OF SECURITIES BY:	
WADE BRUCE COOK 6102 EAST ASTER DRIVE SCOTTSDALE, ARIZONA 85254	DOCKET NO. S-2496-I
AMERICAN BUSINESS ALLIANCE, INC. 12629 NORTH TATUM #551 PHOENIX, ARIZONA 85032 AND 6102 EAST ASTER DRIVE SCOTTSDALE, ARIZONA 85254	DECISION NO. 56492
AMERICAN BUSINESS ALLIANCE, INC. 3760 SOUTH HIGHLAND DRIVE SUITE #407 SALT LAKE CITY, UTAH 84106	
MONARCH FUNDING CORPORATION 5102 EAST ASTER DRIVE SCOTTSDALE, ARIZONA 85254	OPINION AND ORDER

[Docketed May 18, 1989]

BEFORE THE ARIZONA CORPORATION COMMISSION

RENZ D. JENNINGS
CHAIRMAN
MARCIA WEEKS
COMMISSION
DALE H. MORGAN
COMMISSIONER

IN THE MATTER OF THE OFFERING OF SECURITIES BY:	
	DOCKET NO. S-2496-I
WADE BRUCE COOK 6102 EAST ASTER DRIVE SCOTTSDALE, ARIZONA 85254	
AMERICAN BUSINESS ALLIANCE, INC. 12629 NORTH TATUM #551 PHOENIX, ARIZONA 85032 AND 6102 EAST ASTER DRIVE SCOTTSDALE, ARIZONA 85254	DECISION NO. 56492
AMERICAN BUSINESS ALLIANCE, INC. 3760 SOUTH HIGHLAND DRIVE SUITE #407 SALT LAKE CITY, UTAH 84106	
MONARCH FUNDING CORPORATION 5102 EAST ASTER DRIVE SCOTTSDALE, ARIZONA 85254	OPINION AND ORDER

DATES OF HEARING:	March 13 and 14, 1989
PLACE OF HEARING:	Phoenix, Arizona
PRESIDING OFFICER:	Miss Beth Ann Burns
APPEARANCES:	DIOGUARDI, POLI & BALL, LTD., by Mr. James B. Ball, Attorney, on behalf of the Respondents; and Mr. Robert K. Corbin, Attorney General, by Ms. Norma Martens, Assistant Attorney General; and Mr. Jim D. Nielsen, Staff Attorney, Securities Division, on behalf of the Securities Division of the Arizona Corporation Commission.

DOCKET NO. S-2496-I

BY THE COMMISSION:

On February 7, 1989, the Director of the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") issued a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist to the above-named Respondents.

On February 17, 1989, Respondents submitted an answer to the notice and requested that a hearing be held in this matter.

By Procedural Order dated February 21, 1989, the hearing was scheduled to commence on February 28, 1989.

On February 24, 1989, Respondents filed a motion to continue the hearing for 10 to 14 days. The Division did not oppose the motion.

By Procedural Order dated February 27, 1989, the hearing was continued to March 13, 1989.

The hearing commenced on March 13, 1989 and concluded on March 14, 1989. Both parties appeared and were represented by counsel. At the hearing, the Division presented as witnesses Ms. Margaret Ellis, an Investigator with the Division, Ms. Esther Turner, a Securities Specialist and Staff Account with the Division; Mr. David A. Tew, a former employee of Respondents; and three investors, Mr. Gary Huish, Mr. Ludwig Steininger, and Mr. Ray F. McNally. The Division also called on cross-examination Respondent Mr. Wade Bruce Cook. The Respondents presented no witnesses.

The Division submitted a post-hearing brief on April 14, 1989. No reply briefs were filed.

* * * * *

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes and orders that:

FINDINGS OF FACT

1. On February 7, 1989, the Director of the Division issued a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist to the above-named Respondents.

2. On February 17, 1988, Respondents submitted an answer to the notice and requested that a hearing be held in this matter.

3. A public hearing in this matter was conducted on March 13 and 14, 1989.

4. Mr. Wade Bruce Cook was at all relevant times: Director, President, and an incorporator of American Business Alliance, Inc., Arizona ("ABA-AZ"); Chairman of the Board of Directors, President and majority stockholder of American Business Alliance, Inc., Utah ("ABA-UT") (ABA-AZ and ABA-UT collectively "ABA"); and Director and President of Monarch Funding Corporation ("Monarch").

5. Mr. Cook is an entrepreneur who has written books and conducted frequent business seminars concerning such topics as building wealth, investing in real estate, acquiring rental property, and taking companies public.

6. On April 24, 1986, the Commissioner of Securities for the State of Missouri issued a cease and desist order to Mr. Cook for the sale of unregistered, non-exempt securities in violation of state law.

7. On June 4, 1987, Mr. and Mrs. Cook filed a voluntary petition with the United States Bankruptcy Court for the District of Arizona.

8. Mr. Cook has not been registered with the Division as a securities salesman.

9. ABA-AZ was at all relevant times an Arizona corporation which was incorporated on or about June 16, 1987 and had its charter revoked by the Commission on September 10, 1988 for failure to file an annual report.

10. ABA-AZ was at all relevant times controlled and operated by Mr. Cook.

11. ABA-UT was at all relevant times a Utah corporation which was originally incorporated on January 27, 1986 as Dogmatic, Inc. ("Dogmatic"), and was purchased by Mr. Cook in July 1987.

12. On December 1, 1987, the Securities Division of the Utah Department of Business Regulation issued an order suspending all transactional exemptions for Dogmatic due to its offer or sale of unregistered, non-exempt securities in violation of law.

13. On December 28, 1987, Mr. Cook filed with the Utah Division of Corporations an amendment to Dogmatic's Articles of Incorporation changing the name to ABA.

14. Although no documents concerning a merger have been filed with the Commission, representations were made by ABA on October 26, 1987 and by Mr. Cook on December 28, 1987 that Dogmatic had merged into ABA-AZ.

15. ABA has not registered securities nor been registered as a securities dealer with the Division.

16. Monarch was at all relevant times an Arizona corporation which was incorporated on February 25, 1988 as a wholly-owned subsidiary of ABA-AZ and had its charter revoked by

the Commission on August 10, 1988 for failure to publish its Articles of Incorporation.

17. Monarch was at all relevant times controlled and operated by Mr. Cook.

18. Monarch has not registered securities nor been registered as a securities dealer with the Division.

19. On September 17, 1987, Mr. and Mrs. Ray F. McNally attended one of Mr. Cook's seminars, during which he offered ABA stock for sale and described ABA's business as encouraging the formation of other companies and sponsoring various educational activities.

20. At the conclusion of the seminar. the McNallys paid a fee of $295 to enroll as members of ABA, for which they received a "bonus" of 100 shares of ABA restricted common stock.

21. The next day the McNallys purchased 20,000 shares of restricted common stock in ABA for $5,000.

22. On December 8, 1987, the McNallys attended a meeting at Mr. Cook's office in Scottsdale, Arizona, during which he offered ABA stock for sale with the inducements of a reduced

price of ($.20 per share rather than the customary $.25 per share) for $7,500 investments and of various warrants for the future option to purchase ABA stock.

23. At a meeting, the McNallys purchased 17,500 shares of restricted common stock in ABA for $2,500.

24. On February 22, 1987, the McNallys attended a seminar in Phoenix, Arizona, during which Mr. Cook described Ameri-Guard Equities, Inc. ("Ameri-Guard"), as a new Nevada corporation whose capital was being raised by Monarch.

25. Mr. Cook also indicated that he could only discuss the sale of Ameri-Guard stock with stockholders and that he was therefore giving stock to members of the audience so he could then talk to them about purchasing additional stock in the company.

26. At the seminar, the McNallys each received a "gift" from Mr. Cook of 50 shares of restricted common stock in Ameri-Guard, for a total of $10.00.

27. The stock purchase orders for the Ameri-Guard stock were printed on Monarch letterhead.

28. On or about February 29, 1988, the McNallys and approximately 2,000 other individuals were sent by Mr. Cook, through Monarch, stock certificates for 100 shares of stock in each of the following: Bondrite Masonry Products, Inc. ("Bondrite"), Consumer Sounding Board Franchise Systems, Inc. ("Consumer sounding Board"), Ameri-Guard, Senate Financial Services, Inc. ("Senate"), Uptown Capital Corporation ("Uptown"), Presidential Capital Corporation ("Presidential"), Congress Capital Corporation ("Congress"), and Sunstar Equities, Inc. ("Sunstar").

29. The cover letter accompanying the stock certificates indicated that the purpose of the gift shares was to establish a shareholder base in the 8 shell corporations into which other private businesses could merge and become public companies.

30. None of the 8 companies have registered securities nor have been registered as dealers with the Division.

31. The Bondrite stock certificate and Mr. Cook represented that the company was incorporated in Nevada, but it was not.

32. On January 13, 1988, Mr. Gary Huish and Mr. Ludwig Steininger attended one of Mr. Cook's free real estate seminars held in Phoenix, Arizona.

33. At the conclusion of the seminar, Mr. Huish and Mr. Steininger, with approximately 25 other interested members of the audience, received from Mr. Cook a "gift" of 50 shares of restricted common stock in ABA for an administrative fee of $5.00.

34. Mr. Steininger received a stock certificate evidencing his ownership of the stock, but Mr. Huish did not.

35. Shortly after he received the stock, Mr. Huish was contacted by one of Mr. Cook's representatives concerning a special ABA stockholders meeting to be held on January 19, 1988 at Mr. Cook's office in Scottsdale, Arizona.

36. Mr. Huish attended the meeting with 2 other interested stockholders, during which Mr. Cook offered ABA stock for sale.

37. In response to Mr. Cook's invitation and inducement at the meeting, Mr. Huish purchased 8,000 shares of ABA stock by endorsing to Mr. Cook 104 shares of A.L. Williams Company valued at $2,000.

38. This transaction was later rescinded because, despite repeated inquiries, Mr. Huish did not receive a stock certificate evidencing his ownership of the stock.

39. On or about January 28, 1988, Mr. Huish and Mr. Steininger attended a seminar in Scottsdale, Arizona, during which Mr. Cook discussed sunstar's growth potential and suggested that anyone interested in purchasing its stock speak to him or a representative present.

40. At that time, Mr. Huish agreed to purchase 4,000 shares of restricted stock in Sunstar for $1,000, but within the next 4 days decided to be more cautious and not complete the purchase.

41. The stock purchase order Mr. Huish had signed was printed on Monarch letterhead.

42. The day following the seminar, Mr. Steininger met Mr. Cook at his office and purchased 20,000 shares of restricted common stock in Sunstar by writing a check to Monarch for $5,000.

43. In February 1988, Mr. Steininger attended another seminar at Mr. Cook's office, at which time Mr. Cook offered for

sale stock in Consumer Sounding Board and gave Mr. Steininger a "gift" of 100 shares of the stock for the $5.00 administrative fee.

44. Respondents received value for the "gifts" of stock because:

(1) The so-called "administrative fees" or "transfer fees" exceeded the actual cost of the transfer and therefore represented payment for the securities;

(2) The shares established the requisite stockholder base for the 8 companies to operate as shell corporations, thereby enhancing their marketability as being publicly held and/or increasing the value of the stock retained by Mr. Cook and ABA;

(3) The transactions created/maintained the good will of Respondents and the companies with the attendees of the seminars; and

(4) The transactions benefitted Respondents and the companies by inducing the stock recipients to purchase further shares.

45. In connection with the offer and/or sale of securities to the McNallys, Mr. Steininger, and/or Mr. Huish, Respondents failed to disclose:

(1) There was a Utah corporation, as well as an Arizona corporation, named ABA;

(2) On April 24, 1986, the Commissioner of Securities for the State of Missouri issued a cease and desist order to Mr. Cook for the sale of unregistered, non-exempt securities in violation of state law;

(3) On June 4, 1987, Mr. and Mrs. Cook filed a voluntary petition with the United States Bankruptcy Court for the District of Arizona;

(4) On December 1, 1987, the Securities Division of the Utah Department of Business Regulation issued an order suspending all transactional exemptions for Dogmatic, ABA-UT's predecessor, due to its offer or sale of unregistered, non-exempt securities in violation of law;

(5) Neither Mr. Cook, ABA, Monarch, Bondrite, Consumer Sounding Board, Ameri-Guard, Senate, Uptown, Presidential, Congress, nor Sunstar were registered with the Division; and

(6) The financial condition of ABA or Monarch.

46. In connection with the offer and/or sale of securities to the McNallys, Respondents misrepresented that Dogmatic and ABA merged in July 1987 and that Bondrite was a Nevada corporation.

47. Respondents received at least $390,841.50 from at least 150 investors.

48. Mr. Cook misappropriated $24,879.54 of investors' funds to pay the Internal Revenue Service for his personal income tax liability and allocated the payments to the furniture and equipment account on Monarch's March 1988 expense register.

49. Mr. Cook misappropriated $23,000 of investors' funds in connection with the purchase of his personal residence and allocated the payments to the loans to officers account on Monarch's March 1988 expense register.

50. The Division recommends that the Commission order Respondents to: make an offer of rescission and restitution to the investors pursuant A.R.S. Section 40-2032 and A.A.C. R14-4-309; and jointly and severally pay an administrative penalty of $150,000, within 30 days from the effective date of this Decision.

51. When the Division called Mr. Cook as a witness on cross-examination, he invoked his Fifth Amendment privilege against self-incrimination to all questions except those that asked for his name and current occupation.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona Constitution and A.R.S. Section 44-1801, et seq.

2. The shares of stock offered and sold by Respondents are securities within the meaning of A.R.S.Section 44-1801(20).

3. Respondents' actions, including the gifts of stock, constitute offers and/or sales of securities within the meaning of A.R.S. Section 44-1801(10) and (16).

4. Respondents made offers and sold unregistered securities within Arizona in violation of A.R.S. Section 44-1841.

5. Respondents offered and sold securities without being registered as salesmen or dealers in Arizona in violation of A.R.S. Section 44-1842.

6. Respondents offered and sold securities within Arizona through material misrepresentations and omissions of material facts which were necessary in order to make the statements not misleading in light of the circumstances under which they were made; and employed a device, scheme, or artifice to defraud and engaged in transactions, practices, or a course of business which constituted a fraud upon prospective and actual investors, in violation of A.R.S. Section 44-1991.

7. Respondents should be restrained from any future violations of A.R.S. Sections 44-1841, 44-1842, and 44-1991, or any other provisions of the Securities Act of Arizona ("Act").

8. Respondents should be directed to offer rescission and restitution to the investors pursuant to A.R.S. Section 40-2032 and A.A.C. R14-4-303.

9. In light of the record evidence which establishes that Respondents violated both the registration and anti-fraud provisions of the Act, and taking into consideration the fact that Mr. Cook appropriated investors' funds for personal purposes, the Commission agrees with the Division that Respondents should be assessed an administrative penalty of $150,000.

10. In a civil proceeding, an adverse inference may be drawn from the invocation of the Fifth Amendment Privilege. Phelps Dodge Corporation v. The Superior Court in and for the County of Cochise, 7 Ariz. App. 277, 438 P.2d 424 (1968).

ORDER

IT IS THEREFORE ORDERED that pursuant to the authority granted to the Commission under A.R.S. Section 44-2032, Mr. Wade Bruce Cook, American Business Alliance, Inc. (Arizona), American Business Alliance, Inc. (Utah), and Monarch Funding Corporation, their agents, servants, employees, assigns, successors, and those persons acting in concert or participation with them shall case and desist from the following and other violations of the Securities Act of Arizona:

(1) Offering to sell or selling securities within or from the State of Arizona without first registering said securities by description under Article VI of the Securities Act of Arizona or registering said securities by qualification under Article VII of the Securities Act of Arizona, or qualifying for exemption thereunder;

(2) Offering to sell or selling securities within or from the State of Arizona without first registering as dealers or salesmen under Article IX of the Securities Act of Arizona, or qualifying for an exemption thereunder; and

(3) Directly or indirectly making any untrue statement of material fact and/or omitting to state material facts necessary in order to make the statements made, in light of the circumstances in which they are made, not misleading in connection with the offer or sale of any security within or from Arizona, and engaging in transactions and practices or a course of business

which operates or would operate as a fraud or deceit upon potential or actual investors.

IT IS FURTHER ORDERED that pursuant to the authority granted to the commission under A.R.S. Section 44-2032, Mr. Wade Bruce Cook, American Business Alliance, Inc. (Arizona), American Business Alliance, Inc. (Utah), and Monarch Funding Corporation, shall pursuant to A.A.C. R14-4-308 offer rescission and restitution for securities sold within and from Arizona, subject to any legal setoffs for restitution previously made, said payment to be made within 60 days from the effective date of this Decision.

IT IS FURTHER ORDERED that pursuant to the authority granted to the Commission under A.R.S. Section 44-2036, Mr. Wade Bruce Cook, American Business Alliance, Inc. (Arizona), American Business Alliance, Inc. (Utah), and Monarch Funding Corporation shall, jointly and severally pay an administrative penalty in the total amount of $150,000, said payment to be made 90 days after the effective date of this Decision, payable to the State Treasurer for deposit in the general fund of the State of Arizona.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

s/Renz D. Jennings	s/ Marcia Weeks	s/Dale H. Morgan
CHAIRMAN	COMMISSIONER	COMMISSIONER

IN WITNESS WHEREOF, I JAMES MATTHEWS, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of this Commission to be affixed at the Capitol, in the City of Phoenix, this 17 day of May, 1989.

s/ James Matthews
JAMES MATTHEWS
Executive Secretary

DISSENT _____
babs

(2827)

APPENDIX E

[Filed 9-12-90]

PROSECUTING ATTORNEY:
WARREN GRANVILLE
AZ BAR #006079
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-3881

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA	)	CR90-10121
	)	
Plaintiff,	)	29 SGJ 88
	)	
vs.	)	INDICTMENT
	)	
WADE BRUCE COOK,	)	
	)	
Defendant,	)	CHARGING VIOLATIONS
	)	OF:

A.R.S. § 13-2310
Fraudulent Schemes and Artifices
Class 2 Felony
Count 1

A.R.S. § 44-1841
Sale of Unregistered Security
Class 4 Felony
Counts 2 - 9

A.R.S. § 44-1842
Sale of Security by an Unregistered Salesman
Class 4 Felony
Counts 10 - 17

A.R.S. § 13-2312
Illegal Enterprise
Class 3 Felony
Count 18

The State Grand Jury accuses WADE BRUCE COOK, charging that in Maricopa County, Arizona:

Count 1

Between on or about February 10, 1988 and February 15, 1988, defendant Wade Bruce Cook, pursuant to a scheme or artifice to defraud, did knowingly obtain a benefit by means of false or fraudulent pretenses, representations, promises or material omissions.

Said conduct occurred in connection with defendant obtaining $40,000.00 from Kevin M. Clark for an investment in CEO Financial Group through Monarch Funding Corporation.

All in violation of A.R.S. § 13-2310.

Count 2

Between on or about June 19, 1987 and November 11, 1987, defendant Wade Bruce Cook did offer or sell, within or from this state, a security not registered by description or qualification and not exempt.

Said conduct occurred in connection with defendant's offer or sale of a security to Conrad C. Trueb, in the form of stock in American Business Alliance, Inc., also known as ABA, in the amount of $10,000.00.

All in violation of A.R.S. § 44-1841.

Count 3

Between on or about June 19, 1987 and October 1, 1987, defendant Wade Bruce Cook did offer or sell, within or from this state, a security not registered by description or qualification and not exempt.

Said conduct occurred in connection with defendant's offer or sale of a security to Daniel Trueb, in the form of stock in American Business Alliance, Inc., also known as ABA, in the amount of $2,000.00.

All in violation of A.R.S. § 44-1841.

Count 4

Between on or about July 6, 1987 and November 11, 1987, defendant Wade Bruce Cook did offer or sell, within or from this state, a security not registered by description or qualification and not exempt.

Said conduct occurred in connection with defendant's offer or sale of a security to Janie Lee, in the form of stock in American Business Alliance, Inc., also known as ABA, in the amount of $5,000.00.

All in violation of A.R.S. § 44-1841.

Count 5

Between on or about September 3, 1987 and December 16, 1987, defendant Wade Bruce Cook did offer or sell, within or from this state, a security not registered by description or qualification and not exempt.

Said conduct occurred in connection with defendant's offer or sale of a security to J. M. Powers, in the form of stock in

American Business Alliance, Inc., also known as ABA, in the amount of $5,000.00.

All in violation of A.R.S. § 44-1841.

Count 6

Between on or about September 18, 1987 and December 16, 1987, defendant Wade Bruce Cook did offer or sell, within or from this state, a security not registered by description or qualification and not exempt.

Said conduct occurred in connection with defendant's offer or sale of a security to Ray and Gloria McNally, in the form of stock in American Business Alliance, Inc., also known as ABA, in the amount of $7,500.00.

All in violation of A.R.S. § 44-1841.

Count 7

On or about October 15, 1987, defendant Wade Bruce Cook did offer or sell, within or from this state, a security not registered by description or qualification and not exempt.

Said conduct occurred in connection with defendant's offer or sale of a security to Joanna Galvin Wray, in the form of stock in

American Business Alliance, Inc., also known as ABA, in the amount of $1,000.00.

All in violation of A.R.S. § 44-1841, 13-301, 13-302, and 13-303.

Count 8

Between on or about January 29, 1988 and April 19, 1988, defendant Wade Bruce Cook did offer or sell, within or from this state, a security not registered by description or qualification and not exempt.

Said conduct occurred in connection with Defendant's offer or sale of a security to Ludwig Steininger, in the form of stock in Sunstar Equities, in the amount of $5,000.00.

All in violation of A.R.S. § 44-1841.

Count 9

Between on or about February 10, 1988 and February 15, 1988, defendant Wade Bruce Cook did offer or sell, within or from this state, a security not registered by description or qualification and not exempt.

Said conduct occurred in connection with defendant's offer or sale of a security to Kevin M. Clark, in the form of stock in CEO Financial Group, Inc. in the amount of $40,000.00.

All in violation of A.R.S. § 44-1841.

COUNT 10

Between on or about June 19, 1987 and November 11, 1987, defendant Wade Bruce Cook did sell or offer to sell a security within or from this state when defendant was not registered to sell or offer to sell securities.

Said conduct occurred when defendant sold stock in American Business Alliance, Inc., also known as ABA, to Conrad C. Trueb for $10,000.00, when defendant was not registered with the Arizona Corporation Commission as a dealer or salesman.

All in violation of A.R.S. § 44-1842.

COUNT 11

Between on or about June 19, 1987 and October 1, 1987, defendant Wade Bruce Cook did sell or offer to sell a security within or from this state when defendant was not registered to sell or offer to sell securities.

Said conduct occurred when defendant sold stock in American Business Alliance, Inc., also known as ABA, to Daniel Trueb for $2,000.00, when defendant was not registered with the Arizona Corporation Commission as a dealer or salesman.

All in violation of A.R.S. § 44-1842.

COUNT 12

Between on or about July 6, 1987 and November 11, 1987, defendant Wade Bruce Cook did sell or offer to sell a security within or from this state when defendant was not registered to sell or offer to sell securities.

Said conduct occurred when defendant sold stock in American Business Alliance, also known as ABA, to Janie Lee for $5,000.00, when defendant was not registered with the Arizona Corporation Commission as a dealer or salesman.

All in violation of A.R.S. § 44-1842.

COUNT 13

Between on or about September 3, 1987 and December 16, 1987, defendant Wade Bruce Cook did sell or offer to sell a security

within or from this state when defendant was not registered to sell or offer to sell securities.

Said conduct occurred when defendant sold stock in American Business Alliance, Inc., also known as ABA, to J.M. Powers for $5,000.00, when defendant was not registered with the Arizona Corporation Commission as a dealer or salesman.

All in violation of A.R.S. § 44-1842.

COUNT 14

Between on or about September 18, 1987 and December 16, 1987, defendant Wade Bruce Cook did sell or offer to sell a security within or from this state when defendant was not registered to sell or offer to sell securities.

Said conduct occurred when defendant sold stock in American Business Alliance, Inc., also known as ABA, to Ray and Gloria McNally for $7,500.00 when defendant was not registered with the Arizona Corporation Commission as a dealer or salesman.

All in violation of A.R.S. § 44-1842.

COUNT 15

On or about October 15, 1987, defendant Wade Bruce Cook did sell or offer to sell a security within or from this state when defendant was not registered to sell or offer to sell securities.

Said conduct occurred when defendant sold stock in American Business Alliance, Inc., also known as ABA, to Joanna Galvin Wray for $1,000.00, when defendant was not registered with the Arizona Corporation Commission as a dealer or salesman.

All in violation of A.R.S. § 44-1842, 13-301, 13-302, and 13-303.

COUNT 16

Between on or about January 29, 1988 and April 19, 1988, defendant Wade Bruce Cook did sell or offer to sell a security within or from this state when defendant was not registered to sell or offer to sell securities.

Said conduct occurred when defendant sold stock in Sunstar Equities, Inc. to Ludwig Steininger for $5,000.00, when defendant was not registered with the Arizona Corporation Commission as a dealer or salesman.

All in violation of A.R.S. § 44-1842.

COUNT 17

Between on or about February 10, 1988 and February 15, 1988, defendant Wade Bruce Cook did sell or offer to sell a security within or from this state when defendant was not registered to sell or offer to sell securities.

Said conduct occurred when defendant sold stock in CEO Financial Group, Inc., to Kevin M. Clark for $40,000.00, when defendant was not registered with the Arizona Corporation Commission as a dealer or salesman.

All in violation of A.R.S. § 44-1842.

Count 18

Between on or about June 19, 1987, and December 16, 1987, defendant Wade Bruce Cook was employed by or associated with an enterprise, American Business Alliance, Inc., also known as ABA, and conducted or participated in the conduct of such enterprise's affairs through racketeering involving sale of unregistered securities, transactions involving securities by unregistered dealers or salesmen, and a scheme or artifice to defraud.

Said conduct is more particularly described in Counts 2–7 and Counts 10–15 of this Indictment, which the State Grand Jury hereby incorporates by reference.

All in violation of A.R.S. §§ 13-2301(D)(4)(s) and (t), 13-2312, 13-301, 13-302, and 13-303.

Pursuant to A.R.S. § 21-425, the State Grand Jurors allege that these offenses were committed in Maricopa County.

ROBERT K. CORBIN
Attorney General
State of Arizona

s/ Warren J. Granville
Assistant Attorney General
Warren J. Granville

A True Bill

s/ Carolyn E. Wallace

9-12-90
Date

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(2856)

APPENDIX F

[Received May 13 '91— Processed May 14 '91]

SUPERIOR COURT
MARICOPA COUNTY

CLERK OF THE COURT

May 9, 1991 Hon. Norman D. Hall, Jr. A. Payne
Deputy

No. CR90-10121

STATE OF ARIZONA

Attorney General
By: Warren Granville

v.

WADE BRUCE COOK

Edward F. Novak

Disposition Clerk

Defendant's motion to dismiss indictment was taken under advisement after an evidentiary hearing held on May 3, 1991. The Court has considered defendant's motion, together with the response and reply, the testimony of Norma Martins and James Nielsen and oral argument by counsel, and finds as follows:

1. After a hearing held before the Arizona Corporation commission pursuant to notice by the Director of the Securities Division of that Commission, the Commission did, on or about the

17th day of May 1989, issue its order which, among other things, ordered defendant Cook, along with three corporations jointly and severally, to ". . . pay an administrative penalty in the total amount of $150,000 . . . ."

2. On September 12, 1990, an indictment was returned by the State Grand Jury accusing defendant in eighteen felony counts of violating Arizona statutes, A.R.S. Sections 13-2310 (Fraudulent Schemes and Artifices), 44-1841 (Sale of Unregistered Security), 44-1842 (Sale of Security by an Unregistered Salesman) and 13-2312 (Illegal Enterprises).

3. On April 1, 1991, defendant filed his motion to dismiss indictment with prejudice alleging that the administrative penalty of $150,000 imposed by the commission constituted a punitive rather than a remedial sanction, and that to pursue the instant criminal action arising from the indictment would violate the double jeopardy clause of the United States Constitution.

4. The penalty imposed by the Commission was pursuant to the requested relief seeking an administrative penalty of $5,000 for each violation of law pursuant to A.R.S. Sec. 44-2036.

5. All "administrative fines" collected pursuant to A.R.S. Sec. 44-2036 go to the State Treasurer for the general fund (A.R.S. Sec. 44-2036(C)) as do fines collected from criminal convictions (A.R.S. Sec. 13-811(A)).

6. The order of the Commission assessing the $150,000 penalty shows its intention that it was imposed as a punitive measure or fine. (See paragraph 9 of the May 17th order referring to violations of the registration and anti-fraud provisions of the Securities Act of Arizona, and the finding that defendant Cook appropriated investors' funds for personal purposes.) The Commission, in addition to imposing the $150,000 penalty against defendant, also ordered him to pay restitution to the investors in the sum of $390,841.50.

7. While it is not possible to determine accurately the number of hours devoted by attorneys, CPA's and investigators to the hearing before the commission, evidence produced during the evidentiary hearing supports the amount of costs incurred in the sum of $1,492.05 and the sum of $30,000 for attorney's fees, CPA fees and the cost of investigators. The $30,000 sum is subject to some

question as detailed records of time were not kept which would reflect exactly what was done, and when it was done. In addition, some time was logged on a daily basis, i.e. eight hours per day, rather than accounting for actual time spend on a specific item or project.

8. James Nielsen, senior counsel for the Securities Division was assigned to defendant's case and supervised the activities of CPA's and investigators. He performed some investigative functions himself and acted as a prosecutor in the administration hearing.

Mr. Nielsen testified that the administrative penalty was imposed to deter defendant and others from committing similar acts. There was no remedial aspect to this penalty.

9. In U.S. v. Halpern[sic], 109 S.Ct. 1892 (1989), the court held that the double jeopardy clause of the Constitution prevented the U.S.Government from imposing an additional civil sanction upon a defendant who previously had been fined after conviction in a criminal action arising from the same circumstances,

when the civil sanction could not fairly be characterized as remedial, but only as deterrent or retribution.

10. In Mullet v. Miller, 82 Ariz. Adv. Rep. 46, Division II of the Court of Appeals considered a similar scenario to the instant case. The issue raised by that special action was whether Mullet was placed in jeopardy by virtue of the administrative proceeding before the Arizona Corporation Commission which imposed an administrative penalty, thus precluding the criminal prosecution based on the same conduct. The court reasoned that if the penalty was in fact a punishment, Mullet was placed in jeopardy, and remanded the case to the trial court for an evidentiary hearing and appropriate finding.

The court noted that merely because the proceedings before the Commission were administrative in nature and not prosecutions, this was not controlling as it was still necessary to determine the reason or basis for the penalty.

11. In view of the holdings in Halper, Mullet, supra, and the evidence produced at the evidentiary hearing, this court finds that the administrative penalty of $150,000 imposed upon defendant by

the Commission was punitive rather than remedial in nature, thereby violating the double jeopardy clause of the Fifth Amendment to the United States Constitution and Article 2, Section 10 of the Constitution of the State of Arizona.

IT IS, THEREFORE, ORDERED dismissing this indictment with prejudice.

APPENDIX G

[Filed 7-19-93]

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA,	)	CR-_____
	)	
APPELLANT,	)	1 CA-CR 91-760
	)	
-vs-	)	Maricopa County
	)	Superior Court
WADE BRUCE COOK,	)	No. CR-90-10121
	)	
APPELLEE.	)	PETITION FOR REVIEW
	)	

Pursuant to Rule 31.19 of the Arizona Rules of Criminal Procedure, Appellant petitions the Arizona Supreme Court to review the opinion of the Arizona Court of Appeals in the above-entitled matter, filed June 10, 1993, for the reasons set forth in the following Memorandum of Points and Authorities.

DATED this 19th day of July, 1993.

Respectfully submitted,

GRANT WOODS
Attorney General

s/ Linda L. Knowles
LINDA L. KNOWLES
Assistant Attorney General
Criminal Appeals Section
1275 W. Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-4686
(State Bar Number 012981)

Attorneys for APPELLANT

MEMORANDUM OF POINTS AND AUTHORITIES

I. SYNOPSIS OF THE DECISION OF THE COURT OF APPEALS.

Division One, in a published opinion, affirmed the trial court's dismissal of an indictment charging Appellee with "violations of the Arizona security laws." *State v. Cook*, No. 1 CA-CR 91-0760, slip op. at 1-2 (Ct. App., June 10, 1993).[1] The trial court's dismissal was based upon its findings that the "same

[1] *State v. Cook*, 140 Ariz. Adv. Rep. 25 (Ct.App. 1993).

conduct" for which Appellee was indicted had already been the subject of an order by the Arizona Corporation Commission ["the Commission"] imposing an $150,000 administrative assessment. *Id.* at 2. Finding that the State had incurred costs and attorney's fees of $31,492 in pursuing the administrative action, the trial court held that the $150,000 assessment was punitive. *Id.* at 2, 7. Thus, it concluded that the criminal prosecution was a second attempt to punish Appellee, and was prohibited by the Double Jeopardy Clause. *Id.* at 2.

The court of appeals held that, under *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), *Mullet v. Miller*, 168 Ariz. 594, 816 P.2d 251 (Ct.App. 1991), *cert. denied*, 112 S. Ct. 1245 (1992), and *Taylor v. Sherrill*, 169 Ariz. 335, 819 P.2d 921 (1991), the Double Jeopardy Clause prohibits multiple punishment for the same offense, and applies were the first "punishment" is an administrative assessment. *Cook*, slip op. at 3–4. It stated that an administrative assessment is punitive, rather than remedial, when it is not rationally related to making the government whole. *Id.* The court of appeals then analyzed whether

the trial court abused its discretion in finding the administrative assessment imposed in the present case was punitive, thus prohibiting subsequent attempts to punish. *Id.* at 6. The court did not specifically examine whether the basis of the civil assessment and the criminal indictment were the "same offenses," having previously stated that they involved the same conduct. *Id.* at 2.

In determining whether the trial court had abused its discretion, the court of appeals first examined the language of the statute authorizing the civil assessment to determine whether it was intended for remedial or punitive purposes. *Cook*, slip op. at 5. Finding little guidance there, and rejecting the State's arguments regarding the remedial purposes generally served by securities laws, the court of appeals next examined the wording of the Commission's order imposing the assessment, and testimony of the state attorney who handled the civil case before the Commission. *Id.* at 5, 7–8. It found that the Commission's and the attorney's subjective intent in imposing the assessment were "objective evidence" that the assessment was intended for punitive and deterrent purposes, rather than remedial ones. *Id.* at 7–8. In so doing, the court of appeals

rejected the State's arguments that subjective intent was immaterial. *Id.* at 8.

The court of appeals then compared the amount of the assessment to the costs and attorney's fees suffered by the State in pursuing the civil action before the Commission. *Cook*, at 8–11. It rejected the State's arguments that the trial court erred by not considering the intangible damages suffered by the State, such as the injury to the State's economy and the lowering of its tax base. *Id.* at 11. The court of appeals also rejected the State's argument the *Halper*'s holding was a limited one, applicable only to prolific, small-gauge offenders, but not to prolific large-gauge offenders like Appellee, who had been ordered to pay more than $390,000 in restitution to 150 victims. *Id.* at 10. The court of appeals then held that the trial court had not abused its discretion in finding that the assessment in the present case was not rationally related to making the State whole, rejecting the State's argument that the assessment was not overwhelmingly disproportionate to its losses. *Id.* at 10–11.

II. ISSUES PRESENTED FOR REVIEW.

A. In light of the recent overruling of *Grady v. Corbin*,[2] does the Double Jeopardy Clause apply to the entire criminal indictment when the indictment covered the same types of conduct as the previous administrative proceedings, but not the same offenses?

B. Does the *Halper* analysis apply to the entire civil assessment, or only that portion of the assessment attributable to the same offenses upon which the subsequent criminal indictment is based?

C. Where a *Halper* analysis is appropriate, should the court try to determine the subjective intent of the parties involved in evaluating whether the civil assessment is punitive or remedial?

III. FACTS MATERIAL TO THE ISSUES PRESENTED.

On May 18, 1989, the Commission found that Appellee and several corporations controlled and owned by him ["the corporations"] had violated A.R.S. §§ 44–1841 (sale of unregistered

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[2] *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990).

securities), -1842 (transactions by unregistered dealers and salesmen), and -1991 (fraud in purchase or sale of securities). (Exhibit A, Commission Order, dated May 18, 1989, at 3-5, 11-12.)[3] Among others, Ray McNally and Ludwig Steininger testified at the administrative hearing. (Exhibit B, R.T. of March 13, 1989, at 2.) Following the hearing, the Commission made specific findings that Appellee committed the alleged violations in transactions with Mr. and Mrs. Ray McNally, with Ludwig Steininger, and with Gary Huish. (Exhibit A at 5-12.) It also found that Appellee had received at least $390,841.50 from at least 150 investors. (*Id.* at 10.) The Commission ordered Appellee and the corporations to cease and desist violating the State's security laws, to pay $390,841.50 in restitution, and to pay an administrative penalty of $1,000 per victim—$150,000—pursuant to A.R.S. § 44-2036. (*Id.* at 13-14; Exhibit C, Minute Entry of May 9, 1991, at 13b.)

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[3] The Commission's order was attached as Exhibit D to Appellee's Motion to Dismiss Indictment With Prejudice, filed April 2, 1991. This motion is attached hereto as Exhibit F. The transcripts of March 13 and 14, 1989, were also attached to Appellee's motion to dismiss, and are attached hereto as Exhibits B and E, respectively.

On September 12, 1990, the grand jury indicted Appellant on one count of fraudulent schemes and artifices (A.R.S. § 13-2310), eight counts of sale of unregistered security (§ 44-1841), eight counts of sale of security by an unregistered salesman (§ 44-1842), and one count of illegal enterprises (§§ 13-2301(D)(4)(s) and (t), -2312.) (Exhibit D, Indictment.) Four of these counts—counts 6, 8, 14, and 16—named either the McNallys and Mr. Steininger as victims. (*Id.* at 1c-1d, 1g-1h.) The remaining counts involved victims who had neither been named in the Commission's order nor called to testify at the administrative proceeding. (Exhibit B at 2; Exhibit D at 1a-1i; Exhibit E, R.T. of Mar. 14, 1989, at 211.)

Appellee moved to dismiss the indictment with prejudice, claiming that the previous administrative assessment made the subsequent indictment violative of the Double Jeopardy Clause. (Exhibit F, Appellee's Motion to Dismiss.) The trial court held an hearing and considered evidence regarding the government's expenditures to investigate Appellee and bring the administrative action against him. (Exhibit G, Minute Entry of May 3, 1991.) Based upon the wording of the Commission's order and testimony

from the attorney who handled the administrative proceeding for the State, the trial court held that both the Commission and the State's attorney subjectively intended the $150,000 administrative penalty to be punitive and to serve as deterrence. (Exhibit C at 13a–13b.) The trial court also ruled that the government suffered expenses totalling $31,492.05 in investigating this case and presenting it to the Commission. (*Id.* at 13b.) Based upon this evidence, the trial court held that the administrative assessment of $150,000 was punishment that prohibited the subsequent criminal indictment. (*Id.* at 13c–13d.) In so doing, the trial court relied upon *Halper*, which it characterized as prohibiting a punitive civil sanction following a conviction "in a criminal action *arising from the same circumstances*," and *Mullet*, which it characterized as examining whether an administrative penalty prohibited criminal prosecution "*based on the same conduct.*" (*Id.* at 13c, emphasis added.)

The State appealed. (Exhibit H, Notice of Appeal.) As described above in the synopsis of the case, the court of appeals, in a published opinion, affirmed the trial court's dismissal of the criminal indictment.

IV. REASONS WHY THIS COURT SHOULD GRANT REVIEW.

A. BECAUSE, PURSUANT TO *UNITED STATES V. DIXON*,[4] THE LOWER COURTS ERRED IN DISMISSING THOSE CRIMINAL CHARGES THAT PASSED THE *BLOCKBURGER*[5] SAME-ELEMENTS TEST, AND OTHER COURTS ARE LIKELY TO DO THE SAME.

The Double Jeopardy Clause prohibits the State from twice placing a defendant in jeopardy "for the same offense," by prohibiting both successive prosecutions for the same offense following acquittal or conviction, and multiple punishments for the same offense. U.S. Const. amdt. V; *North Carolina v. Pearce*, 395 U.S. 711, 171, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). The Double Jeopardy Clause is applicable to the states via the Fourteenth Amendment. *Benton v. Maryland,* 395 U.S. 784, 793–94, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

In ruling that the Double Jeopardy Clause applied in the present case, both the trial court and the court of appeals apparently relied upon *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109

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[4] *United States v. Dixon*, 61 U.S.L.W. 4835 (June 28, 1993).

[5] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932).

L. Ed. 2d 548 (1990). In *Grady v. Corbin*, the United States Supreme Court held that the Double Jeopardy Clause applied not only to actions for offenses containing the same elements (the *Blockburger* test), but also to actions involving the same conduct. *Grady v. Corbin*, 495 U.S. at 510. As indicated above, the trial court relied upon *Halper* and *Mullet*, which it said applied to subsequent actions "arising from the same circumstances," and "based on the same conduct." (Exhibit C at 13c.) Similarly, the court of appeals stated that the subsequent indictment was "for the same conduct which was the subject of the proceedings before the corporation commission." *Cook*, slip op. at 2.

Shortly after the court of appeals decision in this case, however, the United States Supreme Court overruled *Grady v. Corbin*. *United States v. Dixon*, 61 U.S.L.W. 4835, 4839 (June 29, 1993). The relevant test is no longer whether the two actions involve the same conduct, the standard relied upon by the courts in this case. Pursuant to *Dixon*, the sole test for determining whether the Double Jeopardy Clause applies to prohibit successive prosecutions or multiple punishments is the same-elements test

previously set forth by the Court in *Blockburger*. *Dixon*, 61 U.S.L.W. at 4837. This test "inquires whether each offense contains an element not contained in the other." *Id.* Where each offense contains an element not contained in the other, they are not the "same offense," and the Double Jeopardy Clause provides no bar to multiple punishments or successive prosecutions. *Id.*

In the present case, applying only *Blockburger*, the Double Jeopardy Clause does not apply to fourteen of the eighteen counts in the criminal indictment. As indicated above, the Commission found Appellee in violation of A.R.S. §§ 44-1841, -1842, and -1901 based upon transactions involving the McNallys and Mr. Steininger, and Appellee was later criminally indicted under §§ 44-1841 and -1842 for the same transactions with these victims. (Exhibit A at 5-12; Exhibit D at 1c-1d, 1g-1h.) These counts, involving the same statutes, victims, and transactions, fail the *Blockburger* test and the Double Jeopardy Clause may be applied to them. The Double Jeopardy Clause does not, however, apply to prosecutions or punishments based upon similar types of transactions involving different victims. *See State v. Bennin*, 107 Ariz. 1, 2-4, 480 P.2d

651, 652–64 (1971) (pre-Grady, Double Jeopardy Clause did not bar prosecution for four counts of kidnapping committed by defendant at one time when they were against four separate victims); *State v. Salazar*, 24 Ariz. App. 472, 475, 539 P.2d 946, 949 (1975) (pre-Grady, Double Jeopardy Clause did not prohibit prosecution for battery of one officer following conviction for simple battery of another officer when the two prosecutions were based upon separate acts of hitting occuring during a single fight).

In the present case, Counts 1 through 5, 7, 9 through 13, 15, and 17, involve six victims who did not testify before the Commission and about whom the Commission made no findings in its order. Exhibit A; Exhibit B at 2; Exhibit E at 211.) While the Commission ordered Appellee to pay an $150,000 assessment based upon his receipt of money from 150 victims, there is no evidence in the record on appeal that the additional six people listed on the indictment were among those 150 victims. Thus, there is no evidence that $6,000 of the assessment ($1,000 per victim) is based upon violations against these victims. Without such evidence, the Double Jeopardy Clause does not apply to those counts, regardless

of whether the assessment constituted "punishment" under *Halper*. Based upon *Dixon*, both the trial court and the court of appeals erred in concluding that the Double Jeopardy Clause applied to those counts in the indictment involving victims who were not the basis of the assessment. This error is premised on the courts' findings that the administrative proceeding and the subsequent indictment involved the "same conduct."

Division Two experienced similar problems in *Mullet*. When presented with the same factual scenario—an assessment from the Commission preceding a criminal indictment for illegally conducting an enterprise and fraudulent schemes and artifices—the *Mullet* court remanded the matter to the trial court for a determination of whether the Commission's assessment was rationally related to making the state whole. 168 Ariz. at 595, 597, 816 P.2d at 252, 254. In so doing, it stated that if the assessment was determined to be punitive, the criminal indictment must be dismissed "to the extent that the charges are based on the *same conduct* that was the basis of the proceeding before the Commission." *Mullet*, 168 Ariz. at 597-98,

816 P.2d at 254–55 (emphasis added). The court did not further define what it meant by the term "same conduct."

This issue has arisen in past cases involving criminal prosecutions subsequent to administrative proceedings, and is likely to arise again as other courts rely upon this case and *Mullet*. The Arizona courts need this Court's guidance regarding how to properly analyze this issue, especially in light of *Dixon*. Moreover, the courts need guidance regarding the general application of *Dixon* to double jeopardy claims. Therefore, this Court should accept this petition for review and provide the necessary guidance. If nothing else, this Court should depublish *Cook* because it presents an incorrect analysis regarding the applicability of the Double Jeopardy Clause and will lead other courts astray.

B. BECAUSE THE COURT OF APPEALS MISAPPLIED *HALPER* BY COMPARING THE STATE'S COSTS TO THE ENTIRE ADMINISTRATIVE ASSESSMENT, RATHER THAN ONLY TO THAT PORTION OF THE ASSESSMENT ATTRIBUTABLE TO THE SAME OFFENSES FOR WHICH APPELLEE WAS SUBSEQUENTLY INDICTED, AND THE COURTS OF THIS STATE NEED GUIDANCE ON THIS IMPORTANT AND RECURRING ISSUE.

As indicated above, the Double Jeopardy Clause *is* applicable to those counts involving the McNallys and Mr. Steininger because the Commission had previously found Appellee in violation of A.R.S §§ 44-1841 and -1842 based upon those same transactions that form the basis of counts 6, 8, 14, and 16 of the indictment. (Exhibit A at 5-12; Exhibit D at 1c-1d, 1g-1h.) The court of appeals, however, misunderstood and misapplied *Halper* to those counts to which the Double Jeopardy Clause applies. Other Arizona courts are likely to do the same.

In *Halper*, the defendant was convicted of 65 counts of violating the criminal false claims statute, and 16 counts of mail fraud, based upon his filing of 65 false claims for Medicare reimbursement. 490 U.S. at 437. The government then brought a civil action for all 65 false claims, alleging 65 violations of the civil False Claims Act. *Id.* at 438.[6] Pursuant to the civil statute, the defendant was liable for a civil penalty of $2,000 per violation, plus

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[6] In the present case, the administrative proceedings came before the criminal proceeding. This Court has held that this distinction does not change the applicability of *Halper*. *Taylor v. Sherrill*, 169 Ariz. at 343, 819 P.2d at 929.

double damages, for a total civil liability of over $130,000. *Id.* The United States Supreme Court held:

> [U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Id. at 448–49.

In determining whether the civil assessment was remedial or so grossly disproportionate that it constituted punishment, the Court examined whether there was a rational relationship between the amount of the civil assessment and the damages to the government caused by defendant's conduct. *Halper*, 490 U.S. at 449. The Court limited its holding as follows:

> [T]he only proscription established by our ruling is that the Government may not criminally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole.

Id. at 451 (footnote omitted). Applying its ruling, the Court remanded the matter to the district court to allow the government to

present evidence of the injuries caused by the defendant's actions. *Id.* at 452.

In the present case, the court of appeals stated that it was applying *Halper* in determining whether the $150,000 assessment constituted punishment. *Cook*, slip op. at 3–8, 10–11. In *Halper*, however, the criminal proceedings and subsequent civil penalty were based upon the *same* 65 false claims. In contrast, in this case the administrative assessment of $150,000 was based upon 150 victims—$1,000 per victim—while the criminal proceeding involved only two victims, the McNallys and Mr. Steininger, to whom the Double Jeopardy Clause applied.[7] The court of appeals did not appreciate this distinction, and examined the issue of whether the entire $150,000 assessment was punishment. Only $2,000 of that assessment, however, was attributable to the McNallys and Mr. Steininger, the victims for whom Appellee was subsequently criminally indicted. Once again, the court of appeals, without

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[7] As discussed in the previous section, the Double Jeopardy Clause does not apply to the other six victims named in the indictment because there is no evidence that the Commission based a portion of its assessment upon Appellee's transactions involving these victims.

having the benefit of *Dixon*, misunderstood the "same offense" limitation of the Double Jeopardy Clause. It is immaterial that Appellee was sanctioned $148,000 for his securities violations involving 148 other victims. The Double Jeopardy Clause only protects against multiple punishments for the same offense, not for the same conduct involving other victims. Therefore, the correct inquiry is whether that portion of the civil assessment attributable to the offenses for which the defendant is subsequently being criminally prosecuted constitutes punishment pursuant to *Halper*. Thus, the court of appeals should have examined whether the $2,000 assessment attributable to the McNallys and Mr. Steininger constituted punishment pursuant to *Halper*.

Given the proper analysis, the court of appeals did not need to engage in a detailed analysis of the government's costs and losses. Such an analysis only becomes necessary where the cumulative affect of a fixed penalty may become overwhelmingly disproportionate due to the offender's prolific nature:

> What we announce now is a rule for the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction

> overwhelmingly disproportionate to the damages he has caused.
>
> . . . .
>
> It hardly seems necessary to state that a suit under the Act alleging *one or two false claims would satisfy the rational-relationship requirement.* It is only when a sizable number of false claims is present that, as a practical matter, the issue of double jeopardy may arise.

Halper, 490 U.S. at 449, 451 n.12 (emphasis added). Thus, the $2,000 assessment based upon two victims satisfies the rational relationship requirement. Therefore, the subsequent criminal proceeding is not barred by double jeopardy.

Even if the other six victims are considered, a total of only eight claims are present. This is still not the type of prolific situation to which the Court's rule would apply. An $8,000 recovery is no more than the rough justice to which the State was entitled for these particular incidents. Thus, none of the criminal indictment is barred by double jeopardy and it was improperly dismissed.

The same result is reached under a full-blown *Halper* analysis. The trial court found the State suffered $1,492.05 in costs

and $30,000 in attorneys fees. (Exhibit C at 13b.) Both Mr. McNally and Mr. Steininger testified at the administrative hearing, and, as indicated above, the Commission made specific findings regarding violations in transactions with them. (Exhibit A at 5–12; Exhibit B at 2.) Thus, a disproportionate amount of the attorneys fees and costs are related to the violations against these victims. Therefore, dividing the $31,492.05 by the 150 victims does not give an accurate picture of the State's expenditures for the violations for which it subsequently indicted Appellee. Given the increased significance at the administrative hearing of claims involving the McNallys and Mr. Steininger, plus the incidental costs related to the other six victims, an $8,000 assessment does not appear so grossly disproportionate to the State's expenditures as to bar the subsequent criminal proceeding. This Court should therefore reverse the dismissal of the indictment.

In the alternative, if this Court is not satisfied based upon the evidence before it that the $8,000 assessment is rationally related to making the State whole, it should remand the case to the trial court with instructions to determine that portion of the State's expenditures

attributable to the victims later named in the indictment, and to decide whether, based upon its findings, the $8,000 is rationally related to the remedial goal of making the State whole for those expenditures. In so doing, this Court should also instruct the trial court to consider the State's intangible losses caused by Appellee's conduct.

In light of the above analysis and *Dixon*, the analysis set forth by the court of appeals in this case is incorrect and misleading. This Court should accept review in order to set forth the correct analysis on this issue. Without this Court's guidance, other courts are likely to engage in the same analysis that the court of appeals did. As a result, defendants assessed money in an administrative proceeding may be able to escape criminal prosecution and punishment for their conduct, in spite of the fact that the administrative assessment did not constitute punishment. In the alternative, this Court should depublish *Cook* so that other courts are not mislead by it.

C. BECAUSE THE COURT OF APPEALS AND THE TRIAL COURT MISTAKENLY EXAMINED THE APPARENT SUBJECTIVE INTENT OF THE COMMISSION AND THE STATE'S ATTORNEY IN DETERMINING WHETHER THE ASSESSMENT WAS PUNITIVE, AND THE OTHER COURTS ARE LIKELY TO MAKE THE SAME MISTAKE.

This Court should accept this petition and grant relief for an additional reason. In evaluating whether the civil assessment was punishment, the trial court looked at evidence of the Commission's and the State's attorney subjective intent in imposing the assessment. *Cook*, slip op. at 2, 7–8. The court of appeals found that this was an appropriate inquiry, and not an abuse of discretion. *Cook*, slip op. at 8. Such an inquiry is, however, inappropriate:

> Today's holding, I would stress, constitutes *an objective rule* that is grounded in the nature of the sanction and the facts of the particular case. It *does not authorize* courts to undertake *a broad inquiry into the subjective purposes* that may be thought to lie behind a given judicial proceeding.

Halper, 490 U.S. at 453 (Kennedy, J., concurring) (emphasis added). Attempts to analyze this issue subjectively, rather than objectively, can only lead to problems both judicially and legislatively:

> Such an inquiry would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in name. It also would breed confusion among legislators who seek to structure the mechanisms of proper law enforcement within constitutional commands.

Id. This Court should accept review and clarify that, where a *Halper* analysis is warranted, the courts should look only at objective factors in determining whether the civil assessment is punishment, and not at subjective factors in an attempt to discern the intent of the administrative agency or the state in this one particular case.

V. CONCLUSION.

Pursuant to *Dixon*, the Double Jeopardy Clause applies only to successive prosecutions and multiple punishments for the same offense. Given *Dixon*, the court of appeals opinion in this case is based upon incorrect premises. The court of appeals applied the Double Jeopardy Clause to bar a criminal indictment for conduct that was not the basis of a previous administrative assessment. Additionally, in determining whether an administrative assessment was punishment, it looked at the entire assessment even though only a portion of it was attributable to offenses for which Appellee was subsequently indicted. Finally, the court evaluated what it believed to be the subjective intent of the imposition of the assessment in order to determine whether it was punishment for constitutional purposes. These fundamental misconceptions regarding application

of the Double Jeopardy Clause will be perpetuated if this Court does not accept review. Appellant therefore respectfully requests this Court to accept review and reverse the court of appeals opinion, setting forth the correct analysis as discussed above. If this Court declines review, Appellant asks this Court to depublish the court of appeals opinion so that other courts do not follow its erroneous analysis.

RESPECTFULLY SUBMITTED this 19th day of July, 1993.

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CRM91-1114
CR91114.PR

(2841)

Supreme Court, U.S.
FILED
JUL 1 1994
OFFICE OF THE CLERK

(2)

No. 93-1985

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

STATE OF ARIZONA,
Petitioner,
vs.
WADE BRUCE COOK,
Respondent.

On Petition For Writ Of Certiorari To The Arizona Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether this Court will take jurisdiction to decide constitutional questions which were never presented either to the trial court or the court to which certiorari is requested.

II. Whether *United States v. Dixon* impacts this case because neither court below relied on *Grady v. Corbin*.

III. Whether lower courts need guidance to apply *United States v. Dixon*.

COUNTERSTATEMENT OF THE CASE

A. Administrative Proceedings.

On February 7, 1989, the Securities Division of the Arizona Corporation Commission ("ACC") filed the equivalent of a complaint against Wade B. Cook ("Respondent") and various entities claiming violations of Arizona Revised Statutes § 44-1841, selling unregistered securities, A.R.S. § 44-1842, selling securities without a license, and A.R.S. § 44-1991, securities fraud (Motion to Dismiss Indictment With Prejudice, dated April 1, 1991 [hereinafter "Motion"], Attachment C, pp. 10-14). Based on these alleged violations, the Securities Division held a full hearing and sought relief which included:

> Order [Cook] to pay the Commission an administrative penalty of $5,000 for each violation of law alleged in this Notice, pursuant to A.R.S. § 44-2036.

(*Id.*, p. 14).

The ACC issued its opinion and found *inter alia* that Cook sold securities through material misrepresentations and omissions of

material fact by employing a "device, scheme, or artifice to defraud" in violation of A.R.S. § 44-1991 (Pet. App. D, p. D-16).[1] Although only three investors testified during the administrative hearing, the ACC ordered Cook to pay "restitution to [all of] the investors" "for securities sold within and from Arizona" (*id.*, pp. D-16 & D-19). The total amount of restitution was $390,841.50. The ACC also ordered Respondent to cease and desist the selling of securities in Arizona and to pay a $150,000 administrative penalty (*id.*, pp. D-17 & D-19). With regard to the administrative penalty, the ACC held:

> In light of the record evidence which establishes that [Cook] violated both the registration and anti-fraud provisions of the Act, and taking into consideration the fact that Mr. Cook appropriated investors' funds for personal purposes, the Commission agrees with the Division that [Cook] should be assessed an administrative penalty of $150,000.

(*Id.*, ¶ 9). The large restitution award coupled with the $150,000 administrative penalty forced Cook and his wife into bankruptcy (Motion, p. 4).

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[1] Petitioner argues that Count One of the indictment is a different offense than punished in the ACC proceeding. Count One charges Respondent with scheme or artifice to defraud in violation of A.R.S. § 13-2310. *See* Pet. App. E, p. E-2. In *Hernandez v. Superior Court*, 1994 Ariz. App. LEXIS 111 (May 19, 1994), the Arizona Court of Appeals found an identical charge to be a different offense in part because the ACC did not base its securities fraud violations on a scheme or artifice to defraud. *Id.* at *19-20. It is obvious from the ACC Order that the opposite is true with respect to Respondent. It is unclear what impact this difference would have on the double jeopardy analysis. Similarly, Count 18, the state RICO allegation, is based on predicate acts of securities fraud and scheme or artifice to defraud (Pet. App. E, pp. E-11 & E-12). These underlying predicate acts were also punished by the ACC. The remaining 16 counts of the indictment allege securities fraud violations and, despite Petitioner's contention to the contrary, are identical to the offenses punished by the ACC.

B. Criminal Proceedings.

On September 12, 1990, Petitioner indicted Respondent for the same conduct which formed the basis of the ACC action (Petitioner's Opening Brief to the Arizona Court of Appeals, p. 2). On April 1, 1991, Respondent filed a motion to dismiss the indictment with prejudice arguing that the $150,000 administrative penalty assessed against him was punitive in nature thereby amounting to prior jeopardy. Based upon this motion, the trial court ordered on April 29, 1991, an evidentiary hearing to determine whether the $150,000 administrative penalty was punitive or remedial.

During the evidentiary hearing, the Securities Division prosecutor testified as to the actual purpose of the administrative penalty. The prosecutor stated that the Securities Division requested and obtained the $150,000 administrative penalty "to deter Mr. Cook and others" from committing similar acts (Transcript of 5/3/91 at 29), and that there was no "remedial aspect" to the administrative penalty (*id.* at 30).

Petitioner opposed Respondent's motion to dismiss arguing that the $150,000 did not constitute punishment under *United States v. Halper*, 490 U.S. 435 (1989), and *Mullett v. Miller*, 816 P.2d 251 (Ariz. App. 1991), *cert. denied*, 112 S. Ct. 1245 (1992). Petitioner also argued that the holding in *United States v. Halper* and its progeny was limited to "small gauge offenders" which did not include Respondent.

The trial court found that the ACC intended the $150,000 administrative penalty to be a punitive sanction (Pet. App. F at ¶ 6), and that there was "no remedial aspect to this penalty" (*id.*, ¶ 8). The trial court then applied *United States v. Halper* and *Mullett v. Miller* and dismissed the indictment with prejudice because "the administrative penalty of $150,000 imposed upon defendant by the Commission was punitive rather than remedial in nature,

thereby [if the indictment would proceed forward, it would violate] the double jeopardy clause of the Fifth Amendment to the United States Constitution and Article 2, Section 10 of the Constitution of the State of Arizona" (*id.*, ¶ 11).

C. Arizona Court of Appeals' Decision.

Petitioner appealed from this order and raised the same two issues presented before the trial court. First, whether a civil proceeding that punished the defendant but preceded the criminal proceeding actuated double jeopardy protections. Second, whether the $150,000 administrative penalty constituted punishment under *United States v. Halper*. These were also the only issues the Arizona Court of Appeals decided in its June 10, 1993 opinion. *State v. Cook*, 870 P.2d 413 (Ariz. App. 1993) (Pet. App. A).[2]

The Arizona Court of Appeals affirmed and, specifically, held that: (1) the ACC's order and testimony from the ACC prosecutor provided "objective evidence of a punitive intent" which proved the ACC sought to punish and did punish Wade Cook in the administrative proceeding, *id.* at 416; (2) the $150,000 administrative penalty constituted punishment because it was not "rationally related to the goal of making the Government whole." *Id.* at 417.

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[2] SUPREME COURT RULE 14.1(h) requires Petitioner to "show that the federal question was timely and properly raised so as to give this Court jurisdiction . . . ." The Petition suggests Petitioner raised the issues for the first time to the Arizona Supreme Court. Respondent attaches Petitioner's Opening Brief to the Arizona Court of Appeals as evidence these issues were not raised before. *See* Appendix A.

D. Arizona Supreme Court.

Petitioner does not ask this Court to review any of the issues presented to or decided by the Arizona Court of Appeals. Rather, in a Petition for Review to the Arizona Supreme Court, Petitioner dramatically modified its position, dropped the issues presented to the court of appeals and presented three issues never specifically presented to either the trial court or the Arizona Court of Appeals. Two of the new issues concern *United States v. Dixon*, 113 S. Ct. 2849 (1993), decided shortly after the court of appeals' decision.[3] Basically, Petitioner argued that some of the offenses charged in the indictment are different than those punished in the ACC proceeding.

Cook responded to the Petition for Review by arguing that Petitioner waived all issues not previously briefed before the trial court or Arizona Court of Appeals, the record below was not created for Petitioner's new issues, and Arizona law independently provided a basis to affirm the court of appeals' decision.[4] On April 6, 1994, the Arizona Supreme Court denied the State's Petition for Review and thereby refused to hear the case (Pet. App. B). Petitioner then filed a timely Petition for Certiorari.

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[3] These are the same questions presently articulated in the Petition for Certiorari.

[4] Respondent argued that the Arizona double punishment statute, A.R.S. § 13-116, prevents Petitioner from punishing a defendant twice for the same "act or omission." *See, e.g., State v. Gordon*, 778 P.2d 1204 (Ariz. 1989); *State v. Rogowski*, 634 P.2d 387 (Ariz. 1981) (double punishment statute precludes multiple convictions for one act or omission). Respondent also argued that Arizona's double jeopardy clause defines "offense" more broadly than this Court. *See, e.g., State v. Cassius*, 520 P.2d 1109 (Ariz. 1974) ("[I]n order to constitute different offenses, no element of either offense may be an element of the other; *i.e.*, the two offenses must not contain a common element.... The federal courts use a different test, less favorable to the defendant. They hold that the offenses charged are not the same if each contains an element not contained in the other. *Blockburger v. United States*, 284 U.S. 299, 304 ... (1932)").

REASONS FOR DENYING THE WRIT

I. This Court Cannot Accept Jurisdiction Of The Petition Because The Questions Presented Were Never Presented To Or Decided By An Arizona Court.

"It has long been settled that this Court acquires no jurisdiction to review the judgment of a State court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such State court." *Whitney v. People of State of California*, 274 U.S. 357, 360 (1927) (citing numerous cases); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Crowell v. Randell*, 10 Pet. 368, 391 (1836); *Street v. New York*, 394 U.S. 576, 581-83 (1969); SUPREME COURT RULE 14.1(h). Failure to raise an issue as required by state law again divests this Court of jurisdiction. *Eldeman v. People of State of California*, 344 U.S. 357, 358 (1953) ("this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law"); *Hulbert v. City of Chicago*, 202 U.S. 275 (1906); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 308 (1903); *Hill v. California*, 401 U.S. 797, 805-06 (1971); *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974).[5] Petitioner admits it failed to raise the issues articulated in its Petition for Certiorari until it filed a Petition for Review to the Arizona Su-

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[5] Respondent expects Petitioner to argue that it could not raise the issue until this Court authored *Dixon*. Petitioner would be wrong. This Court dealt with an identical situation in *Herndon v. State of Georgia*, 295 U.S. 441, 442-43 (1935), where the petitioner also argued that the Court should accept jurisdiction because it claimed a new ruling was unanticipated and occurred only in time to file a motion for rehearing with the state court of appeals. *Id.* at 443-44. The Court found that the issue was ripe before the trial court due to an earlier state court opinion. The Court concluded that the petitioner should have anticipated a similar ruling in its case. The same is true here. *See Section II, infra.*

preme Court (Petition at 8). Petitioner also admits the Arizona Supreme Court refused to hear the case (Petition at 9).

Most analogous is *Bailey v. Anderson*, 326 U.S. 203 (1945), where the petitioner raised a federal question for the first time to the Supreme Court of Appeals of Virginia which refused to decide the new issue. 326 U.S. at 204-06. This Court dismissed the case for lack of jurisdiction:

> Unless [the constitutionally based issue] affirmatively appears upon the record brought here for review on appeal, this court is without jurisdiction of the appeal. Jacobi v. State of Alabama, 187 U.S. 133, 135-36 . . .; Mutual Life Ins. Co. v. McGrew, 188 U.S. 291, 309 . . .; Chicago, I. & L. R. Co. v. McGuire, 196 U.S. 128, 131 . . .; see Flournoy v. Weiner, 321 U.S. 253, 262, 263 . . . .

Id. at 207. *See Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549-50 (1987); *Webb v. Webb*, 451 U.S. 493, 496-97 (1981).

This case presents the traditional situation. Petitioner did not raise the issues presented to this Court until it filed a Petition for Review to the Arizona Supreme Court. The Arizona Supreme Court requires parties to raise the issues below before it will entertain jurisdiction. *See, e.g., State v. Washington*, 447 P.2d 863, 865 (Ariz. 1968) ("We have repeatedly held that matters which were not raised in the lower court will not be considered as grounds for reversal in this Court."); *Van Loan v. Van Loan*, 569 P.2d 214, 216 (Ariz. 1977) ("The issue was first raised at oral argument before the Court of Appeals. The failure to raise an issue either at the trial level or in briefs on appeal constitutes a waiver of the issue."); *State v. McNeill*, 707 P.2d 972, 973 (Ariz. App. 1985) ("It is well settled that only issues presented in superior court are pre-

served for review; all others are waived.").[6] Moreover, the Arizona Supreme Court's denial of the Petition for Review, much the same as the denial of a petition for certiorari by this Court, has no legal impact. *See, e.g., Calvert v. Farmers Ins. Co. of Arizona*, 697 P.2d 684, 690 n.5 (Ariz. 1985) (denial of a petition for review "does not mean we accepted the Court of Appeals' legal analysis or conclusion . . . . Denial of a petition for review has no precedential value.").

Petitioner's waiver is "particularly inappropriate" because the new issues it raises are fact-intensive and prevent Respondent from properly preparing the appellate record. *State v. Brita*, 761 P.2d 1025 (Ariz. 1988) ("[i]t is particularly inappropriate to consider an issue for the first time on appeal where the issue is a fact-intensive one"). This is one of the express rationale the Court articulated for declining jurisdiction in *Cardinale v. Louisiana*, 394 U.S. 437 (1969), where the federal question was first presented in the Petition for Certiorari. This Court derives its jurisdiction to review state court opinions from statute, 28 U.S.C. § 1257, and has articulated multiple reasons for declining cases where issues were not briefed and decided by a state appellate court:

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. *Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind.* And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way

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[6] *See also* ARIZ. R. CRIM. P. 31.19(c)(2) (petition for review shall contain "[t]he issues . . . *decided by the Court of Appeals* and which the petitioner wishes to present to the Supreme Court for review") (emphasis added).

> which saves their constitutionality. Or the issue may be blocked by an adequate state ground.

394 U.S. at 439 (emphasis added). *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940).

Each of the concerns expressed in *Cardinale* would exist were the Court to hear this case. Throughout the Petition, Petitioner claims "there is no evidence" in the appellate record that the offenses charged in the indictment are identical to those punished by the ACC (Petition at 12 (twice), & 17 n.3). Respondent disagrees with this assertion because the ACC order specifically concerns all investors; however, to the extent the record does not contain a more detailed list of the investors covered by the ACC order, it is only because Petitioner did not raise this issue at the trial court level.

Thus, the court below never confronted the two issues Petitioner seeks this Court to review. *Bailey v. Anderson*, *Eldeman v. People of State of California*, and numerous additional precedents control this case and require that the Court refuse to accept the Petition.

II. The Arizona Court Of Appeals Did Not Rely On *Grady v. Corbin*; Therefore, *United States v. Dixon* Has No Application To This Case.

Petitioner's arguments rest on the hypothesis that "both the trial court and the Arizona Court of Appeals apparently relied upon the holding in *Grady v. Corbin*, 495 U.S. 508 (1990)" — a case overruled by *United States v. Dixon*, 113 S. Ct. 2849, 2860 (1993). Petitioner's "hypothesis" is erroneous. Neither the trial court nor the Arizona Court of Appeals cite *Grady* for any proposition of law.

The issues Petitioner presented to both lower courts did not require reliance on *Grady*. The sole questions were whether punishment in a civil proceeding that preceded a criminal indictment could act as a jeopardy bar and whether the $150,000 administrative penalty assessed by the ACC constituted punishment. There was no question about whether the offenses were identical; there is no conflict with *Grady* or *Dixon*.

Nothing makes this point more plain than *State v. Nunez*, 806 P.2d 861 (Ariz. 1991), which predates Respondent's motion to dismiss the indictment on double jeopardy grounds. The double jeopardy clause protects against both successive prosecutions and multiple punishments. *Halper*, 490 U.S. at 440, *citing North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). In *Nunez*, the Arizona Supreme Court held that "the modified *Blockburger* test as announced in *Grady* is limited to cases involving successive prosecutions." 806 P.2d at 865. *Nunez* also held that *Blockburger v. United States*, 284 U.S. 299 (1932), governs double jeopardy claims based upon multiple punishment. 806 P.2d at 864. Any argument by Petitioner that suggests *Dixon* provided the first opportunity to raise these arguments is untrue — Petitioner's own state supreme court has held otherwise.

III. Petitioner Has Not Shown That Lower Courts Need Guidance On How *United States v. Dixon* and *United States v. Halper* Should Interact.

With no conflict on the record, Petitioner attempts to make public importance by contending that "lower courts need guidance." They do not in Arizona. The recent decision of *Hernandez v. Superior Court*, 1994 Ariz. App. LEXIS 111 (May 19, 1994), expressly follows *Dixon*. No case from any other jurisdiction is cited as an example of the need for guidance.

CONCLUSION

Petitioner fails on both criteria for certiorari; either conflict or public importance. Moreover, Petitioner's "issues" were not presented or decided below. The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

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APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	
	)	
Appellant,	)	NO. 1 CA-CR 91-760
	)	
-vs-	)	MARICOPA COUNTY
	)	SUPERIOR COURT
WADE BRUCE COOK,	)	NO. CR 90-10121
	)	
Appellee.	)	
	)	

APPELLANT'S OPENING BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Does the double jeopardy clause preclude the return of an indictment after the imposition of an administrative fine?

2. Is a dismissal mandated if the administrative fine is determined to be punitive, or may the fine be considered in imposing the sentence after conviction?

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STATEMENT OF THE CASE

On February 7, 1989, the Securities Division of the Corporation Commission initiated administrative proceedings against appellee as President and Director of American Business Alliance Inc. and Monarch Funding Corporation. The action was filed pursuant to Article XV of the Arizona Constitution and A.R.S. § 44-1823. On March 13 and 14, 1989, a Corporation Commission administrative hearing was held pursuant to A.R.S § 44-1972.

After considering the exhibits, the arguments of counsel, and the testimony of the seven witnesses, the Arizona Corporation Commission issued its findings of fact and conclusions of law on May 18, 1989. The Commission found that appellee Cook had unlawfully received $390,841.50 from over 150 investors, and that he thereby violated the registration and anti-fraud provisions of the Arizona Securities Act. The Commission ordered Cook to cease and desist his unlawful practices, to pay restitution to his victims, and to pay an "administrative penalty" of $150,000 pursuant to A.R.S. § 44-2036.

On September 12, 1990, a State Grand Jury returned an indictment against appellee, accusing him of one count of Fraudulent Schemes and Artifices (A.R.S. § 13-2310), eight counts of Sale of Unregistered Security (A.R.S. § 44-1841), eight counts of Sale of Security by Unregistered Salesman (A.R.S. § 44-1842), and one count of Conducting an Illegal Enterprise (A.R.S. § 13-2312). (Photostated Instrument, Item 1). The facts supporting the felony counts were the same facts which resulted in the Corporation Commission's earlier findings against appellee.

On April 1, 1991, appellee filed a motion to dismiss his indictment on grounds of double jeopardy, citing United States v. Halper, ____U.S.____, 109 S. Ct. 1892 (1989), and Mullett v. Miller, 82 Ariz. Adv. Rep 46 (Ct. App. 1990). On May 3, 1991, an evidentiary hearing was held before the Honorable Norman D.

Hall to determine the amount of the state's costs incurred for the administrative procedure, as suggested by Mullet.

Based upon the evidence and appellee's stipulation, Judge Hall made a finding of $1,492.05 costs and $30,000 for attorneys' fees, CPA's fees, and investigators' fees. (Minute Entry dated May 9, 1991, at paragraph 7). He determined that the $150,000 administrative penalty imposed by the Commission was punitive and thereby precluded the later indictment returned by the State Grand Jury. (Id. at paragraph 11.) Judge Hall, therefore, dismissed the indictment with prejudice.

The State of Arizona appeals the order of dismissal pursuant to A.R.S. 13-4032(1). The State filed timely notice of appeal on May 21, 1991. (Photostated Instrument, Item 32). This Court has jurisdiction to hear this appeal pursuant to Ariz. Const. Art. VI, Sec. 9, and A.R.S. §§ 12-120.21(A) (1), 13-4031, and 13-4032.

ARGUMENTS

I

THE DOUBLE JEOPARDY CLAUSE DOES NOT PRECLUDE THE RETURN OF AN INDICTMENT AFTER THE IMPOSITION OF AN ADMINISTRATIVE FINE.

The trial court held that under Mullett v. Miller, 82 Ariz. Adv. Rep. 46 (Ct. App. 1990), the fine was disproportionate to the costs of prosecuting the administrative proceeding, and therefore dismissed the prosecution. The state believes the trial court was in error.

A. Double Jeopardy does not bar the subequent criminal prosecution after the administrative penalty was imposed.

In United States v Halper, the United States Supreme Court held that:

> [U]nder the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."

109 S. Ct at 1903. The Court further stated:

> We cast no shadow on these time-honored judgments. [citing cases allowing criminal and civil remedies arising from the same conduct] What we announce now is a rule for the rare case, the case such as the one before us where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damage he has caused . . . We must leave to the trial court the discretion to determine on the basis of such an accounting, the size of the civil sanction the Government may receive without crossing the line between remedy and punishment.

Id. (emphasis added)

The Supreme Court specifically recognized the constitutionality of companion criminal and civil cases arising out of the same or similar facts. The Court also recognized that when determining proportionality, the government's loss is more than just the cost of investigation and prosecution, but also includes such intangibles as the loss of business opportunities that would have been available to others but for the defendant's criminal action.

Halper, 109 S. Ct at 1900; Rex Trailer Company v. United States, 350 U.S. 148, 152, 76 S. Ct. 219, 222 (1956). The Court ruled that a $130,000 civil penalty imposed could be "sufficiently disproportionate" to constitute unlawful double punishment where the loss as the result of the unlawful conduct was $583 and where costs were, at most, $16,000. Critical to the Court's analysis was whether the Government sought the civil penalty in a "subsequent proceeding because it is dissatisfied with the sanction obtained in the first proceeding." 109 S. Ct. at 1903 n.10.

After Halper, the Supreme Court was again asked to interpret the double jeopardy clause as it related to multiple punishments in Jones v. Thomas, ____ U.S. ____, 109 S. Ct. 2522 (1989). The Supreme Court held that in the multiple punishments context, double jeopardy is "limited to ensuring that the total punishment did not exceed that authorized by the legislature." 109 S. Ct. at 2525, (citing Halper). The Court specifically noted that the double jeopardy clause does not exist to provide "unjustified windfalls" to a defendant. 109 S. Ct. at 2528.

In Mullett v. Miller, Division Two of this Court ostensibly applied the Halper doctrine and remanded the case so the trial court could determine whether a $380,000 administrative penalty was purely punitive as opposed to remedial. 82 Ariz. Adv. Rep. 46. In its analysis, the court ruled that jeopardy did not attach solely by reason of the Corporation Commission's administrative proceeding, since it was not considered a prosecution.[1] Id. at p.47. The court went on to rule that only a fine that was "purely punitive as opposed to remedial" would preclude a later criminal prosecution. Id. at 48. The court, therefore, remanded the case for the

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[1] On this point, the court was correct because the double jeopardy clause is not breached by the filing of a criminal prosecution after a civil or administrative action because there has been no acquittal or conviction upon which jeopardy could have attached. Serfass v. United States, 420 U.S. 377, 392, 95 S. Ct. 1055, 1064 (1975); North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); accord, A.R.S. § 13-116.

trial court to determine whether the $380,000 administrative fine imposed was "rationally related to making the state whole in connection with the proceedings before the Commission." Id. The court has misconstrued Halper. See State v Darby, 246 N.J. Super 432, 587 A.2d 1309 (App. Div. 1991) (New Jersey Court of Appeals held on similar facts that subsequent criminal prosecution was permissible).

In his ruling, Judge Hall followed the analysis of the Court of Appeals' decision in Mullett. He correctly found that the previous action by the Corporation Commission did not, by itself, attach jeopardy. Guided by Mullett, Judge Hall then ruled that the $150,000 fine was disproportionate to the $31,500 costs of prosecuting the administrative proceeding. Judge Hall deemed that the fine was punishment, and thereby constituted jeopardy, which precluded the later indictment. Because the Court of Appeals erred in their analysis of what the double jeopardy clause requires when the state seeks to prosecute criminally after a "civil" sanction has been imposed on the same conduct, Judge Hall's decision to dismiss the indictment must be reversed.

In the present case, appellee not only injured the 150 investor-victims by defrauding them out of $390,841.50, but he also diverted that same amount of funds from access to other available legitimate capital formation. The combined overall effect of Cook's fraud thus injured the state's economy, and ultimately reduced its tax base. This is an intangible cost that is directly related to "making the government whole." Halper, 109 S. Ct. at 1903.

The Commission's $150,000 penalty was not "overwhelmingly disproportionate to the damages he has caused." Halper, 109 S. Ct. at 1902 (emphasis added). It was also far less than the $5,000 per incident penalty that could have been imposed under A.R.S. § 44-2036. Without a showing of overwhelming disproportionality, the sanction is presumed to make the government whole. Id.

Appellee was, therefore, not entitled to relief under the double jeopardy clause.

In the present case, the Corporation Commission's order imposed three remedies - injunctive relief, restitution, and liquidated civil penalties. All three of these sanctions are remedial. Halper, 109 S. Ct. at 1902; Rex Trailer, 76 S. Ct. at 221 (civil sanctions calculated at $2,000 for each act, plus double damages and actual costs did not amount to punishment); United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S. Ct. 379, 87 L. Ed. 443 (1943) (defendant fined $54,000 in criminal prosecution; subsequent civil penalty based on $2,000 per count, double the amount of actual damages and costs of the suit totalling $315,000 did not constitute punishment); Helvering v. Mitchell, 303 U.S. 391, 58 S. Ct. 630 (1938) (sanction equalling 50 percent of the $728,709.84 sought for fraudulent filing held not to be a punishment but to reimburse for investigatory and other costs of the taxpayer's fraud); Karpa v. C.I.R., 909 F.2d 784, 788 (4th Cir. 1990) (25% tax penalty is civil sanction because it reflects the costs of investigation and prosecution); United States v. Naftalin, 606 F.2d 809, 812 (8th Cir. 1989) (S.E.C. sanctions are remedial because they are designed to protect the public and are not punitive). The trial court's reliance on Mullett was inconsistent with the United States Supreme Court's holdings in Halper, Hess, Helvering and Rex Trailer. The government is entitled to be awarded civil sanctions in order to be made whole. This amount is more than the cost of prosecution, and includes the actual damage suffered. Halper, 109 S. Ct. at 1902; Rex Trailer, 76 S. Ct. at 221; Ness, 63 S. Ct. 379.

II

THE REMEDY OF DISMISSAL IS LIKEWISE NOT NECESSARY AS APPELLEE, IF CONVICTED, CAN BE SENTENCED IN ACCORDANCE WITH THE PREVIOUS FINE IMPOSED.

There is nothing in the Halper opinion that suggests that the civil sanctions should act as a bar to a subsequent criminal prosecution. Indeed, if a criminal defendant has been convicted and sentenced, the state may still seek civil penalties for the purpose "of making the Government whole." 109 S. Ct. at 1903. The Court noted in Thomas, the goal against double punishment is to ensure that the defendant is not punished in excess of that "authorized by the legislature." 109 S. Ct. at 2525; Halper, 109 S. Ct. at 1903.

Under A.R.S. § 13-603, upon conviction, the trial court would be authorized to sentence appellee to a term of imprisonment, a fine, or both. If Cook is convicted of the crimes charged in the indictment, the sentencing court, under Thomas and Halper, would consider the nature of the Corporation Commission's sanctions at sentencing so that he is not punished in excess of that "authorized by the legislature." Thomas, 109 S. Ct. at 2525; Halper, 109 S. Ct. at 1903. The sentencing court can, in effect, "offset" appellees' sentence in the criminal proceeding in light of the civil sanctions imposed in the previous civil proceeding. A.R.S. § 13-807; State v. Iniguez, 84 Ariz. Adv. Rep. 26 (App. 1991). Prosecuting Cook after the Corporation Commission's action does not violate double jeopardy, therefore, since it does not put him twice in jeopardy or subject him to a penalty above that authorized by the legislature.

Both the Court of Appeals in Mullett and Judge Hall in the present case ignored the Supreme Court's caution that its ruling in Halper was a "rare exception" for "a small-gauge offender" who was subjected to a penalty which wa"overwhelmingly dispro-

portionate" to the damage he caused. Appellee is not a small gauge offender and the administrative penalty was not overwhelming disproportionate to the damage he caused. The Commission's order, therefore, was clearly outside the scope of the "rare case" at issue in Halper. Indeed, the present case is far closer in facts to United States v. Bizzell, 921 F.2d 263, 267 (10th cir. 1990), and State v. Darby where the administrative fines were held to be remedial and not punitive because they were not overwhelmingly disproportionate to the government's costs.

CONCLUSION

With logic that only a lawyer could understand, appellee has not yet paid a cent of the administrative fine imposed on him on May 18, 1989, yet his criminal indictment has been dismissed because of the imposition of that administrative fine. Application of the double punishment doctrine should only be done in rare cases, for small-gauge offenders when the second proceeding's sanction is overwhelmingly disproportionate to the damage he caused. Appellee's case is not the rare case. Appellee is not a small-gauge offender. Appellee's fine was not overwhelmingly disproportionate to the damage he caused. The Double Jeopardy Clause was not intended to provide appellee with such an "unjustified windfall."

Judge Hall's decision to dismiss the indictment and preclude the state from prosecuting appellee for his criminal acts should be reversed.

Respectfully submitted

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